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FEDERAL TAX CLAIMS

WILLIAM A. SCHMITT*

Federal claims, aside from formal contracts, may be roughly grouped into (a) lien,[1] (b) priority,[2] and (c) general; for the purpose of this article on taxes, the forums wherein collection thereof is usually attempted are bankruptcy, federal and state receiverships, probate, sur-

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[1] REV. STAT. § 3186 26 U. S. C. A. § 115 (§613 Revenue Act of 1928). "(a) If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, penalty, additional amount, or addition to such tax, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person. Unless another date is specifically fixed by law, the lien shall arise at the time the assessment list was received by the collector and shall continue until the liability for such amount is satisfied or becomes unenforceable by reason of the lapse of time. (b) Such lien shall not be valid as against any mortgagee, purchaser, or judgment creditor until notice thereof has been filed by the collector—(1) in accordance with the law of the State or Territory in which the property subject to the lien is situated, whenever the State or Territory has by law provided for the filing of such notice; or (2) in the office of the Clerk of the United States District Court for the judicial district in which the property subject to the lien is situated, whenever the State or Territory has not by law provided for the filing of such notice; or (3) in the office of the Clerk of the Supreme Court of the District of Columbia, if the property subject to the lien is situated in the District of Columbia . . ."

"The present general tax lien of the United States dates back to an Act of July 13, 1866 [14 STAT. AT L. 98]. Section 9, among other things, enacts that unless otherwise provided, the collector shall within ten days after receiving the assessment list (or list of taxes as it was then called) give notice to the person or persons liable, stating the amount due, and make demand for payment." O. J. Rogge, "The Tax Lien of the United States," 13 *Amer. Bar Ass'n. Jour.* 576 (1927). If after such demand, etc., the amount shall be a lien from the time it is due, etc. The collector may levy (1) upon all property and rights to property of the taxpayer, (2) on all property and rights to property on which the lien exists. The first part applies to property of the taxpayer; the second part subjects property of a transferee. If personal property is insufficient, then real estate may be seized and sold to satisfy the tax. REV. STAT. § 3196, 26 U. S. C. A. § 125.

Of course, collection may be had by bill in equity under REV. STAT. § 3207, 26 U. S. C. A. § 136, which is entirely different from distraint. In some cases it must necessarily be so. If a corporation has dissolved and the assets sold or distributed among the stockholders, the Government can proceed in a court of equity against it upon the trust fund doctrine, that is, the liability of the stock-

rogate or chancery courts, and other dissolution proceedings whereby the business of the concern or parties is liquidated or assigned, voluntary or otherwise.

Priority, as the name implies, means the state of being first in order, but valid and regular lien claims may be given a superior position by competent authority; or, as is usually stated, the lien[3] is undisturbed and unaffected.

Liens have been variously designated as specific and express, perfected and imperfect, inchoate, general, special, tacit, statutory and equitable. The name itself is not of much importance; the nature of the lien is what is to be considered and what differentiates it from the mere right of priority. The lien of a judgment may be different from the lien of a mortgage—the latter "has been thought to have the effect of a conveyance, divesting the debtor of his title and leaving nothing but an equity to which a preference can attach." In some jurisdictions a mortgage does not carry this significance, while judgments may be liens with or without levy. A mortgage usually signifies

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holders for debts of the corporation in an amount not in excess of the assets recovered from the corporation in liquidation.

"Some liens for internal revenue taxes arise without assessment upon the happening of a particular event; others depend upon assessment made by the Bureau of Internal Revenue. An example of the first class is the tax upon alcoholic liquors, where the lien for the taxes comes into being immediately upon the making of the liquor. So, too, the lien for an estate tax attached to the gross estate of the decedent at the moment of his death, and becomes operative before the estate tax is legally due. An income tax is an excellent illustration of the tax which requires an assessment by the Commissioner to support a lien." W. Streater, 5 *Int. Rev. News,* No. 7, page 5.

[2] Rev. Stat. § 3466, 31 U. S. C. A. § 191. "Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority hereby established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed or absent debtor are attached by process of law, as to cases in which an Act of Bankruptcy is committed."

Rev. Stat. § 3467, 31 U. S. C. A. § 192. "Every executor, administrator or assignee or other person, who pays any debt due by the person or estate from whom or for which he acts before he satisfies and pays the debts due the United States from such person or estate, shall become answerable in his own person and estate for the debts so due to the United States or so much thereof as may remain due and unpaid."

[3] "The word lien is literally the French for a band, cord or chain. It differs from a pledge on the one hand and a mortgage on the other. It is the bond which attaches a creditor's right to a debtor's property, but which gives no right ad rem, that is, to property in the thing." 16 Ency. Brit. (11th ed.) p. 594. *Li(gam)en* in Latin is a band or tie. "Strictly speaking, a lien is not either a *jus in re* or a *jus ad rem.* It is not a property in the thing itself, nor does it constitute a right of action for the thing. It rather constitutes a charge upon the thing." *In re The Ponzan,* 9 F. (2d) 838 (C. C. A. N. Y., 1925). To the same effect *Koenig* v. *Leppert-Roos Fur Co.,* 260 S. W. (Mo. App.) 756 (1924); 4 Kent, Commentaries, (8th ed.) 474-5, *437 (1865).

something akin to ownership. Both are legal liens, as distinguished from equitable.

The procedure for filing tax claims in the different classes of administration is substantially as follows:

1. In bankruptcy the proof of claim should be filed with the referee and a copy sent to the trustee.
2. In receiverships, with the clerk of the court where the proceeding is pending and to the receiver.
3. In dissolution proceedings, whether voluntary or not, with the clerk of the court. nI cases not in court, the claim should be filed with the trustee, agent, assignee or other official in control or in charge of the assets.
4. In estates of decedents, with the court and the executor or administrator.
5. In certain state proceedings a petition of intervention should be filed.

The necessity of following the state statute in such matters is emphasized in cases before probate or surrogate courts, and in certain types of liquidation proceedings where an administrative rather than a judicial character is predominant. In any event, the court or official should be put upon notice at the outset that a Government claim has been filed, asserting a preference under both sections 3186 and 3466, of the Revised Statutes and that a lien is in existence.

After the Government has properly assessed a tax,[4] and has taken the steps necessary to fix the lien, whether generally or by filing the required statutory notice in the locality where the property is situated, the next move is to decide upon the method to employ in presenting the claim for payment. Assuming, for the moment, that the method and forum have been determined, a consideration as to what property the lien or claim will attach is important, as well as highly practical.

Exemptions.

Section 6 of the Bankruptcy Act[5] recites that the allowance of exemptions which are prescribed by state laws at the time of the filing of the petition shall not be affected by the Act. Under section 2(11),[6]

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[4] Under § 274(a) Revenue Act of 1932, 26 U. S. C. A. § 3274(a) upon adjudication of bankruptcy or the appointment of a receiver any deficiency or addition to the tax provided for by law shall be immediately assessed, and the claim may be presented, for adjudication in accordance with law, to the court before which the proceeding is pending. For jeopardy assessment, where the collection of the tax is endangered, see §§ 273 and 1105, Revenue Act of 1932, 26 U. S. C. A. §§ 3273, 4105.

[5] 11 U. S. C. A. § 24.

[6] 11 U. S. C. A. § 11.

courts of bankruptcy are invested with jurisdiction to determine all claims of bankrupts to their exemptions. And it is stated in section 47(11)[7] that the trustee shall set apart the bankrupt's exemptions and report the items and estimate the value thereof to the Court as soon as practical after their appointment.

Section 3187 of the Revised Statutes[8] provides that,

> ". . . there shall be exempt from distraint and sale, if belonging to the head of a family, the school books and wearing apparel necessary for such family; also arms for personal use, one cow, two hogs, five sheep and the wool thereof, provided the aggregate market value of said sheep shall not exceed fifty dollars; the necessary food for such cow, hogs, and sheep, for a period not exceeding thirty days; fuel in an amount not greater than the value of twenty five dollars; provisions in an amount not greater than fifty dollars; household furniture in use to an amount not greater than three hundred dollars; and the books, tools or implements of trade or profession to an amount not greater than one hundred dollars shall be exempt."

When a person files a petition in bankruptcy all the estate that comes into the possession of the trustee is administered by him—and taxes take their allotted place in the distribution thereof. Property not coming into the control of the trustee for administration is not effected, and as taxes are not dischargeable in bankruptcy, the right to proceed against this property is also unaffected. It remains to be seen, then, what property or right in property, as a matter of law, does not pass to the trustee, and what status it acquires in relation to the laws of the particular State.[9] Some of these various interests are exemptions, dower, curtesy, allowances to widows and orphans; and the varying degrees of title or control might be exemplified in community property, estates by entireties, and joint estates. Whether the sale for federal taxes be by suit or distraint, only the property or interest of the taxpayer therein can be disposed of. It is obvious that where the interest invoked is doubtful or of an undivided nature, and probably where local sentiment might intervene, the bidding will not be brisk, and

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[7] 11 U. S. C. A. § 75(a) (11).

[8] 26 U. S. C. A. § 116.

[9] Among exemptions may be classed the allowance for the support of the widow and children; and perhaps the widow's dower right where the lien was asserted after the marriage. It would seem that the *Gen. Counsel's Memo., Bureau of Int. Revenue,* C. B., 824 (Dec., 1926), recognizes the priority of these allowances. They are not classed as "debts" within the meaning of Rev. Stat. §§ 3466-67, 26 U. S. C. A. §§ 191-2, but are charges against the estate. The law that depositors of closed national banks must be paid in full before federal taxes is another type of exemptions. Act of 1879, § 22. Funeral expenses have priority but doctors' bills and wages do not. As to the interest of the wife, as beneficiary, under an insurance policy on the life of her husband, see *In re Reiter,* 58 F. (2d) 631 (C. C. A. Conn., 1932).

the Government might be forced to become the purchaser to escape receiving only a nominal bid.[10]

With the exception of sections 2(11) and 47(11), of the Bankruptcy Act[11], there is no distinction between receiverships and bankruptcy as far as exemptions are concerned. However, in a contest between federal debts, including taxes, and state claims, the particular state statute involved must be consulted, and the interpretation placed thereon by the highest state court. And likewise, in the case of municipal ordinances or statutes of other political subdivisions. Frequently the lien for taxes on real estate will arise at a different stage from that on personalty, due perhaps to the inherent physical differences of the properties.[12] The various statutes prescribe the procedure to be followed, and until these steps—such as assessment, notice, demand, listing or scheduling, enrollment or certification, and levy—are taken, such lien, in many states, does not become perfected. The statute or ordinance may give a lien outright—that is, without requiring any further steps—or it may be only a general statutory lien with the usual force and effect of a priority statute. It is, therefore, necessary where taxes of a city, town, village or borough are involved to note whether they function under a general law or directly under the state constitution. The ordinance or other law must conform to the requirements and be within the powers delegated. These are jurisdictional matters, as distinguished from the actual fact of assessment and accrual of the tax. Both, however, are matters which will be brought before the tribunal charged with passing on the contest between the National and State governments and third parties. These same general considerations apply, for the most part, in dealing with the questions of exemptions.

A state formed out of territory not within the jurisdiction of an existing State or acquired from a foreign country would be subject to the Act of Congress admitting it into the Union. If no restrictions or exceptions are embodied in the Act, the Congress is expressly authorized "to lay and collect taxes, duties, imports, and excises, to pay the debts and provide for the common defense and general welfare of the United States."[13]

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[10] Rev. Stat. § 3192, 26 U. S. C. A. § 121.

[11] *Supra* notes 6, 7.

[12] *State* v. *Snohomish County,* 71 Wash. 320, 128 Pac. 667 (1912); *Puyallup* v. *Lakin,* 45 Wash. 368, 88 Pac. 578 (1907). As to the lien of judgments: The enrollment of the judgment creates the lien in Mississippi. *Johnson* v. *Cole Mfg. Co.,* 44 Miss. 482 (1872). And takes effect as to after-acquired property at the date of such acquisition, and arises at the same time on real and personal property without levy. W. A. Schmitt, "Some Aspects of Judgment Liens," 1 Miss. Law Journal 281 (1929).

[13] Constitution of the United States, Art. I, § 8.

The syllabus in *Fink* v. *O'Neil*,[14] reads as follows:

"The homestead of a defendant is not subject to seizure and sale by virtue of an execution sued out on a judgment recovered by the United States in a civil action, if, had a private party been the plaintiff, it would be exempt therefrom, by the law of the state where it is situated."

A Wisconsin statute was involved which stated that

"A homestead . . . owned and occupied by any resident of this State, shall be exempt from any seizure or sale on execution, from the lien of every judgment, and from liability in any form for the debts of such owner, except laborers', mechanics', and purchase-money liens, and mortgages lawfully executed, and taxes lawfully assessed, and except as otherwise specifically provided in these statutes, etc."[15]

The court said:

"The question, therefore, is whether the United States, by an appropriate legislative act, has adopted the laws of Wisconsin exempting homesteads from execution, and if at all, whether they apply in cases of executions upon judgments in favor of the United States. Sec. 916 Rev. Stat. is as follows: 'The party recovering a judgment in any common law case in any circuit or district court, shall be entitled to similar remedies upon same, by execution or otherwise, to reach the property of the judgment debtor, as are now provided in like cause by the laws of the state in which such court is held, or by any such general rule of such circuit or district courts; and such courts may from time to time, by general rules, adopt such state laws as may hereinafter be in force in such states in relation to remedies upon judgments as aforesaid, by execution or otherwise.' "

The statute of Wisconsin exempting homesteads from execution was in force at the time the Act of Congress of 1872[16] took effect; and the Supreme Court held, as noted above, that the exemptions became a part of the law of the United States within that State and applied to executions issued upon judgments in civil causes recovered in their courts. At the time this decision was rendered, the law provided that the United States could only collect a debt from an unwilling debtor by judicial process—the bringing of suit and obtaining of judgment and issuing execution thereon.[17]

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[14] 106 U. S. 272, 1 S. Ct. 325, 27 L. ed. 196 (1882). The better view seems to be that even in Wisconsin the homestead is subject to distraint and sale, should satisfaction of the outstanding assessment be not made. 2 *Int. Rev. Bul. C. B.*, No. 1, p. 172.

[15] Rev. Stat. of Wis., 1878, Ch. 130 § 2983.

[16] Rev. Stat. § 916, 28 U. S. C. A. § 727.

[17] "Exemptions from taxation are not to be enlarged by implication if doubts are nicely balanced. *Chicago Theological Seminary* v. *Ill.*, 188 U. S. 662, 674.

In *Staley* v. *Vaughn*,[18] it was held that homesteads were not included in the exemptions of the Income Tax Law, and there was no Act of Congress adopting the homestead laws of Texas relative to the payment of income taxes. As it is not necessary to sue in order to collect income taxes, although that method might be employed, care should be taken in selecting a method not to run into the reasoning of the foregoing case.

If a State grants exemptions and exempts the property from taxes, the taxes being a lien, (and such legislation is now being proposed to the Legislatures of some States) the State would be in the same position as the Government now is when it relegates its tax to mortgages. If the state tax is not subordinate to exemptions, of course, the federal tax is not; but there is the difference that the state fixes a status in the spouse, or head of a family, and the subsequent federal tax claim against one spouse might not effect the rights of the other.

Forum

The forum frequently plays an important part in the contest between tax claims. In some respects state and federal receiverships regard the matter in a different light from bankruptcy courts. This is seen in the case of federal non-lien claims and state non-lien claims, federal non-lien claims and state lien claims, and federal lien claims and state lien claims. In like manner, federal lien and non-lien claims occupy different positions in relation to wage claims in bankruptcy and receiverships, and possibly also as to certain statutory liens such as mechanics' and materialmen's liens, etc.[19] Penalties and interest, and statutes of limitations are some of the obvious differences.

On the other hand, they are not to be read so grudgingly as to thwart the purpose of the lawmakers." Cardozo, J., in *Trotter* v. *Tennessee,* U. S. Sup. Ct. (Oct., 1933.)

[18] (Tex. Civ. App.) 50 S. W. (2d) 907, 11 Am. Fed. Tax. Rep. 680 (1932).

[19] These several situations are admirably illustrated in O. J. Rogge, "The Differences in Priority of Federal Claims in Bankruptcy and Equity Receiverships," 43 *Harvard Law Review* 251 (1929). The author prefaces his statement by the following: "There is thus presented the paradox that, in general, it is to the substantial advantage of the United States that the property of an insolvent debtor should be distributed in an equity receivership, either in a state or federal court, rather than in bankruptcy, and per contra, to the advantage of other creditors that the proceedings should be in bankruptcy." (In this connection it might be worthy of notice that the Federal Judges of New Jersey, in November, 1933, called attention to the economic evils attendant upon the filing of involuntary bankruptcy where equity receiverships were engaged in efforts to re-finance and re-establish industries, and called upon the Bar to discourage them.) Federal non-lien claims other than for taxes are superior to state non-lien tax claims in an equity receivership, while in bankruptcy the reverse is true. Federal non-lien tax claims have priority over state non-lien tax claims in an equity proceeding, while in bankruptcy they share *pro rata*. *In re Wyley Co.*, 292 Fed. 900 (D. C. Ga., 1923). Federal non-lien tax claims in receiverships (except the six-

There are some personal, if not antagonistic, elements entering into a contest before a tribunal, due principally to the lack of uniformity of practice and procedure. Naturally, each tribunal is jealous of its prerogatives, and when the question of the validity of a tax claim is before it, it does not hesitate to decide the question with regard to the administrative features rather than the purely legal. This comment applies to referees in bankruptcy and the federal judges who appoint them, and also chancery and probate judges. The estates have to be administered, and the business liquidated with dispatch, and these factors become the prime consideration. It is for such reasons that unless necessity or policy dictates otherwise, care should be exercised not to hastily submit to a particular jurisdiction. A suit, or even the filing of a claim before a tribunal sometimes gives it jurisdiction to pass on the merits of the tax or to review it, while a mere notice of the tax claim or lien does not carry that implication. As property and the administration of an estate of a decedent, for example, will not be taken away from the probate or other court handling them, it is imperative that the federal claim be fully protected in advance from all contingencies. The bankruptcy courts before which the proceedings are held have exclusive jurisdiction, subject to a review by a high court in case of an appeal, to determine the amount of the tax to be paid. If, at the time of bankruptcy, an appeal against an assessment is pending before the Board of Tax Appeals, the decision of the Board (not a court) is not binding upon the bankruptcy court, although its

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months salary claims in railroads and public service corporations) are superior to wages; but in bankruptcy it is otherwise. It is substantially the same when the federal non-lien claim is not for taxes. Federal lien claims for taxes, unless subordinated by Sec. 64(b) of the Bankruptcy Act, 11 U. S. C. A. § 104(b), *a fortiori,* ought to be given priority. The question of federal non-lien claims competition against lien claims should be resolved against the Government in bankruptcy, but in receiverships it is unsettled (see *infra*). Federal lien claims for taxes (except such as are expressly exempted) should not yield either in bankruptcy or receiverships to any other lien claims where the Government has actually perfected its lien by complying with all federal and state requirements. In an equity receivership the United States has priority for the whole penalty. In bankruptcy, with the exception of the amount of the pecuniary loss plus interest as may have accrued by law, the United States is not entitled to recover any penalty. Interest of 1% per month has been held not to be a penalty. *United States* v. *Childs,* 266 U. S. 304, 45 S. Ct. 5, 69 L. ed. 299 (1924). Tax, interest and penalty constitute one case or a single claim as the case might be. As to interest, the rule is the same in bankruptcy and receiverships. "The rule that interest does not run after receiverships or bankruptcy is applicable only in the event that the assets are insufficient to pay the claim in question and all others of the same rank." The Supreme Court, after stating the rule, explains it in the case of *American Iron Works Co.* v. *Seaboard Air Line,* 223 U. S. 261, 34 S. Ct. 502, 58 L. ed. 949 (1914). The Court said it was a necessary rule of distribution. The different debts might have different rates of interest, and the delay in the distribution caused by the law was the fault of no one, and no one should suffer loss or gain advantage by it. See Rogge, *loc. cit., supra,* at 263.

findings should have compelling, if not, conclusive weight.[20] The statute calls for immediate assessment.[21] If the matter is already before the Board of Tax Appeals it cannot be so assessed, and as it does not appear that the Board has concurrent jurisdiction with the other court, the so-called "bar order"—i.e., an order requiring the claim to be filed within a specified time in order to participate in the distribution of assets—raises some difficulties. It is doubted if other than by legislative amendment can the situation be corrected.[22]

Federal Taxes vs. State Taxes and Mortgages

A puzzling situation arises where state tax liens antedate the federal tax, and there is a mortgage prior to both but which under the state law is subordinate to state taxes. In *Exchange National Bank of Spokane, et al.* v. *United States,* [23] the court said:

> ". . . There are no rights of third parties involved in this proceeding that require us to enter into a discussion of the question determined there[24] and which might arise under our own statutes, which make state taxes a superior lien to all others. It is not for the state to assert that because the United States has exempted the mortgagee, purchaser and judgment creditor, and its own

[20] *In re* G. F. Redmond & Co., 17 F. (2d) 128 (D. C. Mass., 1927).
[21] *Supra* note 4.
[22] *In re Chandler Motors of New England, Inc.,* 17 F. (2d) 998 (D. C. Mass., 1927); *In re Sewell,* 45 F. (2d) 660 (D. C. Ida., 1931); *United States* v. *Eyges,* 286 Fed. 683 (D. C. Mass., 1923).
[23] (Wash.) 265 Pac. 722, 724 (1928).
[24] *Ferris* v. *Chic-Mint Gum Co.,* 14 Del. Ch. 232, 124 Atl. 577 (1924). The Chancellor said: ". . . Here we have three claimants, each claiming preference. The first (the state, county and city) admittedly outrank the second (the mortgagee) and we have seen that the second outranks the third (the United States). Yet it is contended that the third is to be preferred to the first and thus displace the second from a position of preference over the third. If this contention be accepted, then indeed will the last be declared to be the first. When the Government agreed by Section 3186 to take rank after the mortgagee, it must necessarily follow that it is subordinate in rank to those who are superior to its immediate senior." This is criticised by O. J. Rogge, *loc. cit., supra* note 19, at 275, and by Newton Montgomery in 6 *Int. Rev. News,* No. 3, p. 13, the latter contending that while the Government agreed to take rank after the mortgagee it did not follow that priority should be surrendered as respects the States; that the States by placing taxes ahead of mortgages was interfering with the assessment of federal taxes. On the other hand, it might be argued that in so far as the state statute was in force at the time that the exemption to mortgagees was created, it impliedly gave its consent to this arrangement. It does not follow that the federal government cannot change it, nor are the general priority rights of the Government impaired in other respects.

An analogous situation may be foreseen in a bankruptcy proceeding in Mississippi, where a judgment creditor, landlord, taxes and wage claimant all seek preference. In that state the landlord can compel payment of rent before execution can issue on a judgment. Taxes take precedence over the landlord (if not a specific lien) but not over a perfected judgment lien. Wages, in bankruptcy, are superior to federal taxes, but not to state lien taxes; and are given no preference under the state law at all.

> statutes make [*sic*] its tax superior to those exempted by the United States, its tax has thereby become superior to the United States tax."

In *Spokane County* v. *United States,* [25] the Supreme Court, in referring to *Ferris* v. *Chic-Mint Gum Co.,* observed as follows:

> ". . . Without concurring in the conclusion of the chancellor, it is enough to say that, as there is no such third creditor here, the case is not in point. Moreover, it is contended by the Government that the relative priorities could have been maintained in that case by setting apart sufficient funds to pay the mortgage before paying the federal taxes and then providing for payment of the state tax out of the sum so set apart."

Although the federal tax lien relates back to the time the assessment list was received by the collector, as against mortgagees, purchasers and judgment creditors the notice of the lien must be filed. Actual notice will dispense with record notice, as far as the taxpayer is concerned, and a waiver of notice will take the place of demand.[26] These conditions precedent must be shown to have been performed in order to prove the tax lien.[27]

Some question has arisen in regard to the precise time the priority right of the Government comes into being. Upon an express or implied admission of insolvency that time might be when the receiver is appointed. But if the insolvency is not certain, and pending the receivership the business becomes insolvent and then the Government files its claim for taxes due for years before the receivership, at what point

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[25] 279 U. S. 80, 49 S. Ct. 321, 73 L. ed. 621 (1929).

[26] *Heyward* v. *United States,* 2 F. (2d) 467 (C. C. A. Ga., 1924). In this case a partnership was incorporated, and subsequently became bankrupt. The Government then assessed additional taxes for a year prior to incorporation. The court said that the tax "became a lien against the property of the partnership. The corporation took this property subject to the tax lien, because it had notice through the former partners . . . although the assessment was not recorded until after the partnership assets were acquired. The bankrupt does not occupy the position of a purchaser without notice and therefore is not entitled to rely on R. S. § 3186 . . . Nor is it material that the trustee in bankruptcy had no notice, actual or constructive, of the bankrupt's liability for a tax due the United States. This is true, although the trustee has a lien of a judgment creditor, for under section 64 of the Bankruptcy Act (Comp. St. § 9648) the tax has priority over debts."

[27] *In re Baltimore Pearl Hominy Co.,* 5 F. (2d) 553 (C. C. A. Md., 1925). "The purpose of requiring a demand as a condition precedent to the tax becoming a lien is protection of the taxpayer; and any such right of protection may be waived by the person interested." The filing of a claim in bankruptcy is *prima facie* evidence that the tax as assessed is due. *Western Express* v. *United States,* 141 Fed. 28 (C. C. A. N. D., 1905); *United States* v. *Cole,* 134 Fed. 697 (D. C. Tenn., 1904). The Government having established a *prima facie* case, the burden is on the trustee to sustain his objection to the federal tax claim. *Whitney* v. *Dresser,* 200 U. S. 532, 26 S. Ct. 316, 50 L. ed. 584 (1906); *In re General Film Corp.,* 274 Fed. 903 (C. C. A. N. Y., 1921); *United States* v. *Rindskopf,* 105 U. S. 418, 26 L. ed., 1131 (1882).

does the priority arise? In *Hatch* v. *Morosco Holding Co.*,[28] the priority was upheld. This holding has been criticised and it is contended that the claim might be allowed as of the time it is filed against a debtor insolvent in fact.[29]

The distinction between the various kinds of taxes should be kept in mind. In the case of estate taxes, under section 315 (a) of the Revenue Act of 1926[30] the lien is upon the gross estate of the decedent, except that such part as is used for the payment of charges against the estate and expenses of its administration allowed by any court having jurisdiction thereof, shall be divested of such lien. Therefore, assessment, demand and refusal to pay are not necessary for the lien to attach. The imposition takes place at the time of death. If the State has such a tax also, it must immediately attach at the death of the decedent to rank with the federal estate tax.

A recent pronouncement on the question of federal *versus* state claims is *Maclay & McWilliams* v. *New York*,[31] decided by the Supreme Court in February 1933. Receivers were appointed for the corporation in 1927 and the United States filed claims for additional taxes due for the years 1917 and 1918, and a claim for expenses incurred in the replacement of a buoy run into by the insolvent's tug. The state filed a claim for franchise taxes due for the years 1921 to 1925, but not assessed or liquidated until after receivership. In addition, another claim was afterwards filed for taxes due for later years. The District Court, Circuit Court of Appeals and the Supreme Court all decided in favor of the Government. Said Justice Cardozo:

> "The decision of this court in Spokane County, Washington v. United States 279 U. S. 80, 70 L. ed. 621, 49 S. Ct. 321 upheld the power of Congress to give priority to debts due to the People of the United States, though the debts thereby subordinated were due to the People of a State, or its political subdivisions. To that decision we adhere. The hardship of the State, if there is any, 'is the necessary consequence of the supremacy of the laws of the United States on all subjects to which the legislative power of Congress extends'. Marshall, Ch. J., in United States v. Fisher, 2 Cranch. 358, 396, 2 L. ed. 304, 316. Cf. Florida v. Mellon, 273 U. S. 12, 17, 71 L. ed. 511, 514, 47 S. Ct. 265.
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> "The tax held to have been subordinated in the Spokane County suit was not a perfected lien upon the property of the insolvent at the date of the receivership. 279 U. S. 80, 93, 94, 73 L. ed. 621,

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[28] 61 F. (2d) 944 (C. C. A. N. Y., 1932).

[29] F. C. Olive, "Collusive Receiverships as Acts of Bankruptcy," 8 *National Ass'n. of Referees Journal,* 25, at 27 (1933); 46 *Harvard Law Review,* 1342 (1933).

[30] 26 U. S. C. A. § 1115.

[31] 288 U. S. 290, 63 S. Ct. 323, 77 L. ed. 754 (1933).

625, 626, 49 S. Ct. 321. The question was reserved whether a different conclusion would have been necessary if such a lien had been proved, 279 U. S. 95. *Certiorari* was granted because of the claim of the petitioner that by the statutes of New York franchise taxes became liens in advance for the years in which they are due, though the amount is not fixed and must be liquidated thereafter. . . . Into these refinements and their consequences, there is no need to enter now. Enough for the present purposes that the statutory preference must prevail against the lien of a tax not presently enforcible, but serving merely as a *caveat* of a more perfected lien to come."

In *Spokane County* v. *United States*,[32] Chief Justice Taft said:

"The foregoing citations certainly make it clear that the United States has power, in order to collect its taxes and its revenues and debts due it, to confer priority for them over those of the states. There remains only to determine what priority it has conferred. It may withhold it or vary it, and it has sometimes done so."

Liens may not arise upon the assets passing to a trustee in bankruptcy after the date of the filing of the petition.[33] And likewise, in receiverships, if not preferred at the time of appointment, no preference is won by anything done thereafter.[34] While taxes are a lien, as seen above, unless notice or the equivalent has been filed by the Collector, such lien is not valid against a judgment creditor.[35] The trustee in bankruptcy being such, then, the question arises as to whether the Government should base its claim upon its rights as a lien-holder or under section 64(a) and (b) of the Bankruptcy Act[36] (under which it is subordinated to a specific and perfected state lien for taxes), or by virtue of section 3466,[37] which we have seen has not yet been definitely construed to give preference over perfected and specific state liens. Can the situation be one of those referred to by Chief Justice Taft when he said that the United States may withhold or vary its priority and has sometimes done so?[38]

Distraint is a method of enforcing the collection of the tax claim, and does not enlarge or otherwise affect the right of the Government except to the extent of perhaps limiting the trustee in bankruptcy to "the rights, remedies and powers of a judgment creditor holding an execution duly returned unsatisfied." Of course, distraint does bring about

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[32] *Supra* note 25.

[33] *Lazarus, Michel & Lazarus* v. *Prentice,* 234 U. S. 263, 266, 34 S. Ct. 851, 58 L. ed. 1305 (1914).

[34] *Maclay & Williams* v. *New York, supra* note 31.

[35] *Heyward* v. *United States, supra* note 26.

[36] 11 U. S. C. A. § 104.

[37] *Supra* note 2.

[38] The instance of the United States' allowing a credit of eighty *per centum* of the estate tax paid to a state.

a change in possession, if not in title. The lien, already in existence before distraint, is strengthened by that act, and the trustee in bankruptcy is charged with notice of the seizure as much as if notice were given thereof—that is, by the actual adverse possession of the property in dispute. Under the laws of a state where taxes are a specific and perfected lien, when distraint is made to satisfy its tax, and bankruptcy ensues within four months, the property so seized does not pass to the trustee to be administered as an asset, to be assessed with the cost of administration, unless the property has equity over and above the amount due for taxes. This is the procedure followed in the case of property under mortgage. According to strict logic, this should be the case where the federal government has a lien for taxes and distraint made. Of course, if notice is filed, and distraint is delayed for a four months' period, there is no reason why this validly encumbered asset should be brought into the estate merely to first subject it to the burdens of section 64(b), 1, 2, 3, 4 and 5, and then distribute the depleted remainder as a tax under 64(b) 6.[39]

Taxes vs. Costs of Administration

In administering insolvent estates, both in the bankruptcy sense and in the equity sense where one is unable to meet his obligations as they mature, a conflict often arises between tax claims and the cost of administering the estate. These costs may include certain taxes, federal, state and local, whether *ad valorem* or excise, arising from the operation of the business by the receiver or trustee. It has been noted, by way of comparison, under section 315(a) of the Revenue Act of 1926,[40] that the lien on the gross estate of a decedent does not apply to such part as is used for expenses of administration allowed by any court having jurisdiction thereof.

When there is no lien (in cases where the Government has not perfected same or has neglected to fulfill the requirements) it has been held that the expense of running the business came ahead of taxes.[41] Section 3466 of the Revised Statutes[42] was not involved in that case. The court said that the property of the insolvent had all been consumed in conducting the business of the receivership—that it was no longer in existence, being consumed in the production of the present fund (or products), which fund was created by the creditors or servants who assisted, not the insolvent, but the receiver.

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[39] *Supra,* note 36.
[40] *Supra* note 30.
[41] *Kennebec Box Co., Inc.* v. *Richards Corp.* (*United States* v. *Johnson*) 5 F. (2d) 951 (C. C. A. N. Y., 1925). See *Piedmont Corp.* v. *G. & N. W. R. Co.,* 30 F. (2d) 525 (D. C. Ga., 1929).
[42] *Supra* note 2.

In *Re Holmes,*[43] the creditors had filed a petition in 1920 and the receiver conducted the business until 1922, issuing certificates of indebtedness under court order; and thereafter another receiver was appointed who wound up the business about March 1923. At this time the Government filed a claim for additional income taxes for the years 1917-1918. Affirming *United States* v. *Johnson,*[44] the court said that this case did not decide the applicability of Revised Statutes, section 3186[45] as there was no evidence of a lien, and expressed the opinion that it did not think it was the intention of Congress in enacting section 3186 to give a lien on property in the hands of a receiver which is insufficient to pay the expenses of receivership incurred on order of court.[46]

A case which presents another angle is *Fayette Bank* v. *Firestone Tire Co.,*[47] where the receiver conducted the business and reported to the Government the number of automobiles manufactured by his company. In this case the tax became due at the time he filed his return. The receiver's certificates were subject to receivership costs and expenses, and this included taxes, both local and federal.

The problem can be resolved into simple questions—namely, what are "costs and expenses" of administration, and does the Government claim under a perfected lien. Strictly speaking, a court entertaining a receivership proceeding or bankruptcy would not have the right to dispose of property upon which there is a valid lien without

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[43] 19 F. (2d) 239 (D. C. Conn., 1927).

[44] *Supra* note 41.

[45] *Supra* note 1.

[46] "The rule of Davis v. Pringle [268 U. S. 315, 45 S. Ct. 459, 69 L. ed. 974 (1925)] is reversed and the United States and the States are expressly declared to be 'persons' which may have priority in bankruptcy on claims other than taxes in accordance with other federal or state laws. Such priority remains a deferred class—that immediately preceding the claims of creditors to dividends." . . . "It is now perfectly clear that the various costs of preserving and administering the estate and wage claims listed in Section 64 have priority over taxes." J. A. McLaughlin, "Amendments to Bankruptcy Act," 40 *Harvard Law Rev.* 341, at 345 (1927).

As a general rule, non-lien claims of the United States are subject to the costs of preserving and administering the estate. See Blair, "The Priority of the United States in Equity Receiverships," 39 *Harvard Law Rev.* 34 (1925) and cases cited.

Also, as a general rule, a lien-holder is not charged with the general expense of preserving and administering the estate—only with the ratable proportion of reasonable expense of the sale of the property subject to the lien. See Rogge, *loc. cit., supra* note 19, at footnotes 16 and 84. *Lerner Stores, Inc.* v. *Electric Maid Baking Shop,* 24 F. (2d) 780 (C. C. A. La., 1928); *Little* v. *Payton,* 54 F. (2d) 678, (D. C. La., 1931). In *Re Wyley, supra* note 19, it was stated: "In all cases due care will be observed to conserve the public revenues, but the reasonable and necessary expense of raising, preserving and disbursing the fund ought to be paid from it, the remainder only being available for distribution." To the same effect is *In re A. E. Fountain, Inc.,* 295 Fed. 873 (D. C. N. Y., 1924).

[47] 30 F. (2d) 318 (C. C. A. Ind. 1929).

granting a hearing to the creditor affected thereby. Nor should it do, in effect, the same thing by authorizing the issuance of receiver's certificates giving them priority over all debts. If such notice of a hearing is given, the lien claimant should object or be estopped from later asserting his lien priority over those debts set out in the order. There is no justification whatsoever in nullifying a lien claim merely to enable the receiver to conduct the business.

Cases of an insolvency within an insolvency, though rare, are not unknown and afford an instance where the collection of a tax might be jeopardized by failure to assert the claim in due time. In *Re Dublin Veneer Co.*,[48] an involuntary petition in bankruptcy was filed and a receiver, appointed in the meantime, conducted the business at a substantial loss, which was only disclosed at the time the final report was filed.

> "The big question is as to the respective priorities of the tax liens and of the indebtedness of the receiver and trustee, representing the loss in operations . . . The essential to this is that there shall be appreciated a difference between taxes with a lien and taxes without a lien, and further that the bankrupt estate does not consist, as a part thereof, of the entire value of the property upon which there is a valid lien, but only the equity in such property . . . Subsection (a) [Sec. 64] directs the payment of taxes. In my opinion this means taxes that have not liens. There was no need to direct the payment of taxes which were already secured by valid liens, but there was need for authority to pay the taxes when there was no lien, both because of the desire to give priority and because it is at least questionable whether taxes come within the definition of provable claims under the statute . . . To take the property covered by valid liens for taxes to pay for losses primarily incurred for the benefit of general creditors would be the wrongful taking of one man's property for the benefit of another."

In this case only state taxes were involved and there were sufficient funds to pay both them and wage claims but the court inferred that wages applied only to the bankrupt estate and this did not disturb the validity of the tax lien. In *Re Glover Casket Co.*,[49] the court decided that wages in bankruptcy came ahead of taxes, and in advance of debts entitled to priority under federal or state laws.

Statute of Limitations

Statutes of Limitations fall into two classes: (1) a statute which goes merely to the remedy, and (2) a statute which extinguishes the liability. The discussion in the cases has been extremely meager on

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[48] 1 Fed. Supp. 313 (D. C. Ga., 1932).
[49] 1 Fed. Supp. 743 (D. C. Ga., 1932).

this question. Congress attempted to place them[50] within type (1) by section 1106(a) of the Revenue Act of 1926. However, confusion and difficulties resulting from this gave rise to section 607 of the Act of 1928, which merely provides that any amount paid after the running of the statute of limitations shall be considered an overpayment and be refunded without regard to the merits. The sections accomplish practically the same thing.

The two things for the average practitioner to recall are the difference between the limitation on Assessment and that on Collection. The provisions which recite that taxes are not dischargeable by bankruptcy and can be collected within six years[51] settle that phase of the question, but as noted, whether the adjudication in bankruptcy or the appointment of a receiver stops the running of the statute is uncertain.[52] Filing a notice and demand for taxes is ordinarily not such a "suit or proceeding" under state or federal law as would affect the running of the statute; but the filing of a formal "claim" is.[53] The filing of a verified claim in receivership has been held to be the commencement of proceedings for the collection of the tax.[54] Whether "proceedings" in court and "commencement of a suit" are equivalent is not so certain. The state decisions should be consulted, especially in receiverships, which are governed by the provisions of the statutes of the state in which the property is located. The procedure is usually prescribed, and when an issue is made up for presentation to the court having jurisdiction it becomes a suit. Appeals before the Board of Tax Appeals do not become a suit until a petition to review brings them to the Circuit Court of Appeals.[55]

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[50] With reference to income taxes. The question is not important where the original tax only is involved. It is a peculiarity of income taxes that the taxpayer makes his return, under oath, as to the amount of the tax. The figures therein may be false or erroneous or deficient; and consequently, upon an investigation a deficiency may be found. This necessarily takes a long time, and before final adjudication certain steps have to be taken to determine the correct amount due (not to mention the right of hearing, appeal and trial, if disputed).

[51] Section 274(b) Rev. Act 1932.

[52] The limitations set out under the different Revenue Acts wil not be detailed here. The amount of income tax imposed by the 1932 Act must be assessed within two years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of that period. Sec. 275, Reg. 77, Art. 1201. There are exceptions for false and no returns filed and waivers. Collection must be begun within six years after assessment. Sec. 277 provides that the running of the statute shall be suspended for the period during which the Commissioner is prohibited from making the assessment (after the mailing of a notice under Sec. 272[a]) or bringing distraint or a proceeding in court (and in any event, if a proceeding in respect of the deficiency is placed on the docket of the Board, until decision of the Board becomes final) and for sixty days thereafter.

[53] *In re McClure Co.*, 21 F. (2d) 538 (D. C. Ga., 1927).

[54] *Hammond* v. *Carthage Sulphite Pulp & Paper Co.* 34 F. (2d) 155 (D. C. N. Y., 1928).

[55] *Old Colony Trust Co.* v. *Commissioner*, 279 U. S. 716, 49 S. Ct. 499, 73 L. ed. 918 (1929); *United States* v. *Strange*, 43 F. (2d) 593 (D. C. Wis., 1930).

Compositions and Extensions

In general, the theory of compositions under the original Section 12 is this: The alleged bankrupt bargains with his creditors of different classes and deposits a fund with which to pay them according to certain terms. This fund is liable for the debts embraced in the offer, whether the fund is actually deposited by the debtor or another at his instigation in pursuance of the composition proposal. If the debtor, through oversight, neglect, mistake or fraud, does not correctly schedule his liabilities, the fund is bound by the terms of the bargain and the actual depositor is placed in the shoes of the alleged bankrupt. Taxes due the United States, if embraced in the offer, are entitled to participate in the fund whether correctly ascertained and scheduled by the debtor or not; and the depositor has no right to a refund as long as any such taxes are outstanding. Whether borrowed or not it is impressed as a trust fund out of which the composition was to be effected,[56] and as distraint cannot be made while the bankruptcy court has control taxes must be paid.

The Bankruptcy Act was amended March 3, 1933 by adding Chapter VIII, entitled "Provisions for the Relief of Debtors."[57] Section 74 deals with compositions and extensions open to individuals and partnerships but not to corporations. Section 75 is the agricultural extension open only to farmers, and section 76 is the plan of railroad reorganization. The parts most pertinent to this inquiry are subsection (a) of section 74 which suspends adjudication, subsection (j) which retains the existing order of priority of the payment of debts, and subsection (m) which is as follows:

> "The filing of a debtor's petition or answer seeking relief under this section shall subject the debtor and his property, wherever located, to the exclusive jurisdiction of the court in which the order approving the petition or answer as provided in subdivision (a) is filed. In proceedings under this section, except as otherwise provided therein, the jurisdiction and powers of the court, the title, powers and duties of its officers and subject to the approval of the court, their fees, the duties of the debtor, and the rights and liabilities of creditors, and all persons with respect to the property of the debtor and the jurisdiction of appellate courts shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered on the day when the debtor's petition or answer was filed and any decree of the adjudication thereafter entered shall have the same effect as if it had been entered on that day."

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[56] *Wechsler* v. *United States,* 27 F. (2d) 850, (C. C. A. Pa., 1928) affirming *In re Moyers Home Stores, Inc.,* 26 F. (2d) 146, (D. C. Pa., 1927).

[57] 11 U. S. C. A. §§ 202-5.

Under section 274(a) of the Revenue Act of 1932[58] the immediate assessment of a deficiency in tax is made upon the appointment of a receiver or adjudication in bankruptcy, yet under the above Amendments to the Bankruptcy Act there will most likely be no adjudication although the effect will be the same as if adjudication had been entered on the day when the debtor's petition or answer was filed. The sixty-day notice of a proposed assessment need not be given after adjudication,[59] but in the event that the proceedings in composition under section 74 do not terminate in bankruptcy (but the case is dismissed upon confirmation), it might then be too late, under the statute of limitations, to give the notice. No offer or settlement can be made that does not propose to take care of taxes in some form or fashion. The right of the Government to its revenue is just as important as the welfare of an individual to be rehabilitated in his business. The Referee and the Judge must have full information regarding taxes that might be involved; but under the present arrangement there does not seem to be any provision for getting the tax liability up on its merits.

Section 75 is the agricultural extension amendment. It differs from a composition in that the latter is payment, although an extension may provide for part in cash and part on time. Upon confirmation of a composition the case will be dismissed. Upon an extension the court may dismiss the proceedings or retain jurisdiction during the period of extension to protect the estate. The same principles should apply here as in the assessing of the tax, and the bearing on its merits, as in the other case.

Section 77 provides for a plan of reorganization approved by the Interstate Commerce Commission and consented to by two-thirds in amount of the several classes of creditors and stockholders, to be confirmed by the Circuit Court of Appeals. Practically the same situation prevails as to taxes as does in the other sections under consideration. There is no doubt but that the court will take care of the tax situation if properly and timely submitted, but the vexing problem for the Government is to determine when and how to assess.[60]

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[58] *Supra,* note 4.

[59] Revenue Act of 1932, § 272(a), 26 U. S. C. A. § 3272(a).

[60] As to the origin of the priority right of the Government, see the Act of 1790 Ch. 35, § 45, 1 STAT. 169; Act of March 3, 1797, Ch. 74, § 5, 1 STAT. 515; Act of 1799, Ch. 128, § 65; *Theluson* v. *Smith,* 2 Wheat. 396, 4 L. ed. 271 (1817). There being no federal common law, the right of priority in the payment of debts due the Government was asserted in statutory form to embrace the immemmorial prerogative of the Crown.

The United States is not bound by the sale in a foreclosure action. *Sherwood* v. *United States,* 5 F. (2d) 991 (D. C. N. Y., 1925). See the current Revenue Act for the method to discharge a tax lien. Probably a different rule would apply tc personal property held as collateral to a loan.

CORAM NOBIS—ANOTHER VIEW

R. J. Farley*

One of the strangest developments in the law of Mississippi has been the present so-called writ of error *coram nobis,* a hybrid apparently, born of *dictum,*[1] without pride of ancestry and now without hope of posterity—if we may take as final the denotation in *Carraway* v. *State.*[2] Twice treated in a preceding issue of this Journal[3] it would seem to have received all the attention deserved, were it not for the fact that it offers in addition to its supposed intrinsic qualities an interesting commentary on the judicial process, and being loath to let the opportunity pass, the writer is encouraged to attempt what perhaps should have been reserved for one more profound in thought and facile in diction.

Until the Revised Code of 1880, writs of error generally were used in Mississippi and the machinery for their proper issuance was contrived by statutes recognizing the necessity where our republican system of government differed from monarchic England. The assumption may well be that early Mississippi legislatures were quite aware that we had no king, to say nothing of a *cursitor,* that all writs need not be issued by Chancery, that their circuit court combined the features of both Common Pleas and King's Bench, but that they desired an appellate court exercising some of the functions of King's Bench and other vagaries. Quite naturally, then, statutes appear in the earliest Codes under which writs of error for the correction of law[4] as well as writs of error for the correction of facts[5] could be issued. Any departure from the common law procedure in this regard can be shown to have its authority in a statute.[6]

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[1] *Fugate* v. *State,* 85 Miss. 631, 37 So. 554, 107 Am. St. Rep. 268 (1904).

[2] 163 Miss. 639, 141 So. 342 (1932).

[3] Simon Rosenthal, "Writ of Error Coram Nobis," 6 Miss. L. Jour. 133; Wm. I. McKay, "Necessity for Right of Appeal from Denial of Writ of Error Coram Nobis," 6 Miss. L. Jour. 143. (Dec. 1933).

[4] Laws of Miss. 1824-1838, p. 217, § 4; Code of 1840, § 47, Ch. 53.

[5] Poindexter's Code, (1823) Ch. 13, p. 105, § 16; Laws of Miss., 1824-1838, p. 404; Code of 1840, Ch. 40, § 2. See note 26, *post.*

[6] Judge Tarbell, in *James* v. *Williams,* 44 Miss. 47 (1870) says, "Although there is no reference in the revised Code to the writ of error *coram nobis,* it is nevertheless a common law remedy and may be adopted in a proper case." This could scarcely be accorded much weight, inasmuch as (1) from the mode of procedure outlined, Judge Sharkey, in the earlier cases, evidently considered the writ to come under the statutes noted in note 5 *supra;* (2) Judge Tarbell was a carpet-

But in 1880, by a revision, the Code provided for our present system of appeals and as a predicate stated what has continued down to the present Code:

> "Writs of error, as heretofore used, are abolished; and all cases, civil and criminal, at law and in chancery, shall be taken to the Supreme Court by appeal as herein provided, and shall be dealt with by said court without regard to the manner of removing the cases to such court."[7]

At this same time (1880) all the machinery for the issuance of writs of error theretofore substituted for the English procedure necessitated by the difference in judicial organization were or had been dropped from the Code.

It is not difficult to believe that Judge Campbell, who revised this Code, was fully cognizant of what he was doing when he wrote this provision. No one would dare say that he was ignorant either of the fact that writs of error *coram nobis* had been used theretofore or of the fact that the standard works of that period treated a writ of error *coram nobis* as a species of writ of error, and certainly some lawyer member of the legislature which adopted the Code would have asked to know when is a writ of error not a writ of error and have demanded that it be clarified had there been any reason to do so. But even if Judge Campbell and the legislature were ignorant, they must have meant *appeal* when they used the word in the paragraph with writs of error to provide for the substitution of the one for the other. It is believed that this statute at one stroke was intended to give everything and more to a litigant as to remedial procedure that ever has been determined by the Supreme Court from that day to this after a long line of strained interpretations, evasions, and circumlocutions in regard to a so-called writ of error *coram nobis,* which after following through a maze of word jungles fetches one up with the surprising intelligence that it is not a writ of error, is not a writ, is not *coram nobis*—or what have you?

The function of writ of error *coram nobis* already had come into vogue through the motion route,[8] which largely supplanted it long before the statute abolishing writs of error. There was no historical process, however, for correction of either the denial of a writ of error

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bag Union soldier from New York, who had recently settled in Mississippi; (3) he was speaking of *coram nobis* for the purpose of correcting one of the Supreme Court's own judgments, and not that of a trial court; (4) he cites as authority for permitting it the common law and ARCHIBALD'S PRACTICE, instead of the several Mississippi cases that had recognized it.

[7] REVISED CODE OF 1880, § 2308.

[8] *James* v. *Williams, supra,* note 6; *Mississippi & Tennessee R. Co.* v. *Wynne,* 42 Miss. 315 (1868).

coram nobis or of a motion pertaining to fact outside the record under a writ of error to a higher court. This deficiency the statute in 1880 supplied by providing for *appeals* in all cases as a matter of course. With this passed the last vestige of need for *coram nobis* insofar as its theoretical functions are concerned,[9] and along with it no tear of veneration, as will be attempted to be shown hereinafter.

But it remained for Justice Whitfield, to divert the trend of our legal process back towards antiquity.[10] Without the slightest ostensible justification other than to *clarify,* he delivered himself of a brainchild almost without parallel in the realm of gratuitous *dictum* for which the succeeding members of the Supreme Court can only be thankful that it wasn't twins. It would have been of no moment had he not claimed that it was a reincarnation of a departed spirit—*coram nobis.* It would have been equally of no moment if it actually had been. But the trouble lies in the fact that its hands are hairy like *coram nobis* but its voice is that of something else. He skips about over the legal universe at will, gathering for the infant only such clothes and from only such shops as suit his fancy—England, Michigan, Indiana, Federal, New York and home again, without the least regard for whether they were manufactured by kings, legislatures, judges or text-writers, foreign or domestic, or for what era, lifting a bit here and a bit there, and when he is through, it is of course still only half clothed. The result is that when we begin trying to keep it in fashion we find that the underclothes, for example, were procured from England because they would be covered up, but actually they show at the knees; and we don't know whether to be so impolitic as to recognize it or not, and if so whether we would then be warranted in getting it some new stockings from the same shop or in objecting to those offered by someone else from another.

The triumph of *coram nobis* was reached in the case of *Hawie* v. *State,*[11] remarkable for a number of reasons, although for the purpose of this paper their consideration is restricted to two: (1) In that the authority for allowing *coram nobis* effectuated a repudiation of the very *raison d'être* of *coram nobis;* and (2) In that for the first time, and then in a dissenting opinion, the statute abolishing writs of error was invoked. Taking these up in order:—

1. After arguing the humanities involved, that is, why something ought to be done, Justice Stevens then offers as the authority for doing what ought to be done in the manner in which he proposes to

[9] This of course is purely a matter of opinion of the writer.
[10] Note 1, *supra.*
[11] 121 Miss. 197, 83 So. 158 (1919).

do it, the inherent powers of courts to correct their records so as to make them speak truth. The reason why *coram nobis* is held to be still existent and not obsolete is the belief by some courts in the lack of any other procedural remedy to correct excusable ignorance of fact inhering in the record but not apparent on its face. As a consequence, it is said that a writ of error proper furnishes no basis for review, a motion for a new trial will not lie, and neither will an appeal. For this reason it is said that *coram nobis* lies only in the trial court; for while the power of a court of record to correct its records is inherent, yet "the records of a court can be corrected or altered only by the court itself; and another court has no authority to make such corrections; even though it has appellate jurisdiction over the court whose records are sought to be corrected."[12] Ergo, the Supreme Court has no more authority to correct or alter a judgment of the circuit court than has the circuit court to correct or alter one for the Supreme Court.

But, it may be said, the appellate court certainly has authority to reverse a judgment of the circuit court. Let us examine the judgment given: "The judgment of the learned circuit court will be reversed, the demurrer to the petition overruled, and the cause remanded for further and appropriate proceedings. Reversed and remanded." The term, judgment, as used here must have referred to the judgment on the petition for *coram nobis*. But the Supreme Court did not remand the cause with the *advice* that the demurrer might be overruled. The Supreme Court overruled it, which was tantamount to granting a *fiat* for *coram nobis*. The lower court had no other alternative seemingly than to grant a hearing on the grounds alleged. And, as a result, the Supreme Court got itself into the ridiculous situation of having to affirm the original judgment when it came up on the heels of the preceding decision, and yet remand the cause to the lower court for the purpose of re-sentencing the defendant on a judgment affirmed as being correct, all in the same breath. The judgment in a criminal case is the sentence, according to the authorities; all else is adducive. This, of course, was not making a correction or alteration. It was simply ordering a trial court to do so. Whence this administrative authority was derived the court did not opine. What it wanted to do was to write an adjudication that would operate as a *supersedeas* pending the outcome of the *coram nobis* hearing. It did. Is it not remarkable that a court could feel justified in accomplishing this without the aid of a statute and yet considered it necessary to go to such lengths to give us *coram nobis,* very much after the manner of Mark Twain's horse doctor who first had to

[12] See *Fugate* v. *State, supra,* note 1; Rosenthal, *op. cit., supra,* note 3, at page 135; *Brown* v. *Sutten,* 158 Miss. 78, 121 So. 835, (1930) and authorities cited.

determine whether he could give the horse the bots because he could cure that and he otherwise had no remedy for the patient?

2. Apparently on the assumption that the statute abolishing writs of error referred exclusively to those of the type for removing records to higher courts, it has not been discussed in any of the cases since its passage, except in the dissenting opinion of Justice Ethridge in the Hawie case; and it is in this other particular that it would seem the case is remarkable, because for the first time it was sensed that despite the difference in those so-called writs of error, they still may have been within the intendment of the statute, inasmuch as the right of appeal was given in all cases, civil, criminal and chancery. Justice Ethridge voiced the belief that the statute abolished all writs of error—but not strongly, preferring to base his dissent primarily on other cogent grounds.

It is presumed in the interpretation of a statute that the legislature intended to write sense and not nonsense. If it is assumed that Section 12 of the Code of 1930 applies only to writs of error for removing causes for review then the first clause, "Writs of error as heretofore used are abolished," becomes utterly nonsensical; and the statute would have exactly the same meaning if it were entirely deleted, for the remainder says that "all cases, civil and criminal, at law and in chancery, *shall* be taken to the Supreme Court by appeal as herein provided, and *shall* be dealt with by said court without regard to the manner of removing the cases to such court." The distinction between the remedies afforded by appeal and by writs of error of all kinds including *coram nobis* and *coram vobis* lies in the strictures of the common law record and the difficulties entailed thereby. This was a remedial statute passed to simplify procedure by making the Supreme Court practice uniform. Under the common holdings of the highest court in the land at the time of its passage and quite general holdings of other jurisdictions the right of appeal gave to the appellate court as an incident if not a necessity for its integrity the right to grant bills of review for matters of fact excusably omitted from the trial below.[13] If this is treated as an incidental or inherent power of an appellate court, then writs of error of all kinds including *coram nobis* and *coram vobis* may be abolished without deprivation of any remedy, the practice is made uniform for all courts on review, and the court can deal with the questions brought up after the manner of appeals as therein provided without regard to the manner in which the case was removed. In this way

[13] *Southard* v. *Russell,* 16 How. 547, 14 L. ed. 1052 (1853); *Kimberly* v. *Arms,* 40 Fed. 548 (1889). See also Note to *Bank of U. S.* v. *Ritchie,* 8 Peters, 128, 8 L. ed. 890 (1834). "We cannot approve what is said on this subject in *Southard* v. *Russell.*" *Hall* v. *Waddill,* 78 Miss. 16, at 43.

the whole body of the statute becomes quite intelligible and sensible.

But herein probably lies the secret of why Justice Whitfield gave forth his now celebrated *dictum* and why we have *coram nobis* to plague us today. In March, 1900, in the case of *Hall* v. *Waddill*,[14] Judge Whitfield refused to follow the line of decisions which would make a bill of review an incident of appeal, holding instead that it first should be requested in the trial court and not in the appellate court after affirmance. In October of the same year, the Holt case[15] involving *coram nobis* was appealed, and while the question of whether the writ was obtainable at all was unanswered since the grounds alleged were so poor as to be like "an invitation to make war on a windmill," it perhaps brought to Judge Whitfield's attention the fact that his recent opinion in the other case did apparently leave no remedy for newly discovered evidence excusably omitted after final judgment at law. As a consequence, he seized on the next opportunity when *coram nobis* was invoked[16] to attempt to fill this void in our procedure which he seemed to have created—which would account for his amazing *dictum*. Regardless of the writer's conjecture, it is significant that Judge Whitfield, wrote both these principal opinions.

And so our court went on "gravely ascending the hill for the purpose of descending, meanwhile filling the books with scholastic disquisitions, verbal subtleties and refined distinctions" about a writ of error that is no writ of error, that is no writ, and that is not *coram nobis,* but if it had been a writ of any kind would have been *coram me.* After the Hawie case began the descent, which, as is usual, was much more rapid. The story is quickly told.[17] Practically the entire power in regard to *coram nobis* is returned to the trial court in the only instances when the process is valuable. The trial court must come to a decision about the matter[18] and its decision would seem to be discretionary.[19]

Regardless of the validity of the conjectures and interpretations of the writer in regard to the statute abolishing writs of error, the fact remains that to all intents and purposes, the Supreme Court in effect has made of *coram nobis* a motion for a bill of review. If one will examine the holdings in the matter of bills of review and compare particularly the trend since *Hall* v. *Waddill* [20] with *coram nobis* since

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[14] 78 Miss. 16, 27 So. 936, 28 So. 831 (1900).
[15] *Holt* v. *State,* 78 Miss. 631, 29 So. 527 (1900).
[16] *Fugate* v. *State, supra,* note 1.
[17] In the next two cases the denial of the writ by the lower court was affirmed. *Corby* v. *Buddendorff,* 98 Miss. 98, 54 So. 84 (1910); *Bennett* v. *State,* 160 Miss. 103, 63 So. 339 (1931).
[18] *White* v. *State,* 159 Miss. 207, 131 So. 96 (1930).
[19] *Carraway* v. *State, supra,* note 2.
[20] Note 13 *supra.*

Fugate v. *State*,[21] it is believed that the only substantial dissimilarity will be found to be that of nomenclature.[22] If the same result has been attained, what difference is made? Aside from the advantage of uniformity, the process of motion for bill of review on account of its conformity to established concepts of appeal would have forced the court from the beginning to examine the problem primarily in its own terms, to deal with the end sought forthrightly, instead of paying primary heed to the means. *Coram nobis* instead of serving as a remedial process, which under all interpretations is its function, has been transformed by the court into a smoke screen to keep from talking about the real problem at issue. As a result, on the occasion when the court feels as though its function should be recognized it is necessary to burn a house down to roast a pig, as witness the only instance when the court has been so minded—*Hawie* v. *State*.[23]

The real problem, of course, is how far the ordinary rules as to final judgments should be relaxed in favor of specific justice—a conflict of the ideals of individual justice and its occasionally-considered necessary sacrifice to public policy or stability. But the court doesn't speak in these terms; instead, it gets us all wound up in terms of the formalities of the process from which it is thoroughly impossible for it or for us to extricate ourselves. By way of example, take the Carraway

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[21] Note 1 *supra*.

[22] See GRIFFITH, MISSISSIPPI CHANCERY PRACTICE, §§ 635-641 (1925). It is no more incongruous to apply bills of review to criminal practice than to allow *coram nobis* in a criminal case, or to permit it in any case where an appeal may be had.

Neither Mr. Rosenthal, nor any of the other writers on *coram nobis*, attempt to explain what becomes of the presumption in a criminal trial, when they say that the writ will never lie to put in issue any fact already adjudicated. What happens to the presumption of intent from proof of certain circumstances at the time of the act, or the presumption of sanity of all persons, at all times, before, at, and after, until proven otherwise? Why is there not an adjudication of these facts just so much as there is of any other presumption? Is it because no affirmative issue was made of them? Then may any presumption not made an issue be ground for *coram nobis*? And why are these not simply erroneous conclusions drawn by the court and jury? Or when the writers speak of the inherent power of a court to correct its records, when are they not speaking of reversing the judgment? The record itself would seem to be perfectly true regardless of whether the defendant is insane. After all the jury really did return a verdict of guilty and the court therefore adjudged that he was guilty and that he be hanged. Which of the recitals is untrue? What is wanted and what will be done if *coram nobis* is upheld will be to have that judgment reversed either by the trial court or by an appellate court. They are here using the term *record*, either consciously or unconsciously in two different senses for a purpose. What happens to this inherent power when a case is reversed on appeal? The answer is that the Supreme Court is either dealing with the case *with* regard to the manner in which it is removed in violation of section 12 of the CODE OF 1930, or else it is not a final judgment as required by section 13, and inherent powers over records has nothing to do with it, except as a manner of speaking to warrant *coram nobis* on common law grounds where there was no appeal.

[23] Note 11 *supra*.

case.[24] The real issue was whether Carraway was entitled to relief under the circumstances. Aside from the sufficiency of his claims as ordinarily opposed to those of society generally was the additional circumstance of a previous adjudication which entailed a consideration of another social ideal. But the court never touches on these. Instead the question "that precedes all the others is: Does an appeal lie from the order of a circuit judge refusing to grant a writ of error *coram nobis*." From this we learn that a writ of error *coram nobis* is a common law writ and that it is a remedial writ and as a consequence no appeal will lie in this case. The rest follows by way of implication. But what are the implications of the common law origin of *coram nobis*? Immediately Carraway's neck is enmeshed with everything from Lord Coke and the *cursitor* down to date, and he should be glad to swap it for a rope. The net result is that we still haven't progressed procedurally as far as Judge Campbell probably thought he had placed us in 1880, but we have reached that point in law practice that Judge Whitfield had brought us down to in the corresponding equity practice in 1900.

It is impossible, of course, to reconcile the procedural complexities of our announced *coram nobis* with the common law. If it were a writ (and the court says it may actually be issued and outlines the procedure therefor), then the issuance of the writ should be a matter of course, whether it is a writ of right[25] or not, inasmuch as the opposing party is not notified until later and it does not operate as a *supersedeas*.[26] Upon the granting of the writ the question of *super-*

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[24] Note 2, *supra*.

[25] "It has sometimes been asserted that the writ is not one of right, so that a ruling of the trial court denying the writ will not be reviewed. This does not seem to be the correct view, however. What the courts mean, when they say that the writ does not lie of right, is that the writ will not be granted on a mere application for it. That is to say, that the writ must be supported by such affidavits or oral evidence as make it appear with reasonable certainty that there has been some error of fact, and that it is not merely sought for delay." 10 *Neb. L. Bull.* 314 (1932); note in 97 Am. St. Rep. 362, 365 (1904). Justice Smith apparently adopts this latter meaning, (citing *Holt* v. *State, supra,* note 15; *Bennett* v. *State,* 106 Miss. 103, 63 So. 339 [1913]) but turns about and says that from this it is clear that the granting or refusing by a judge in vacation is not a judgment at all. Whereas, in exactly the same situation the Arkansas Supreme Court holds that where the application is thus made and supported, the appellate court may reverse the denial as error; and further, that if the appeal statute does not provide for appeals in such cases, *certiorari* should be used. *Hodges* v. *State,* 111 Ark. 22, 163 S. W. 506 (1914). The appeal and *certiorari* were then combined on hearing. It would seem that this could be done under our system, even using, if necessary, Rule 4 of the Supreme Court Rules. On the other hand, at common law the difference between writ of error *coram nobis* and writ of error was that the first contained no *certiorari clause*—for a reason!

[26] "When the writ is actually issued, the practice in this state seems to be to obtain a *fiat* therefor from the judge of the court in which the judgment was rendered, directing that the writ and citation to the opposite parties be issued; and

sedeas should come up on motion for execution by the defendant in error.[27] Furthermore, all the authorities are agreed that the writ was an original writ and began an entirely new action and our court seems to have treated it as such.[28] Surely, then, the judgment of the lower court denying it must be considered a record judgment.

Nevertheless, if it belongs in the class of remedial writs under section 742 from which no appeal lies, we are still in a mess, for section 742 of Code of 1930 is a direct successor to section 2, chapter 40, Code of 1840, which was in effect at the time of *Fellows* v. *Griffin,* and provided for the issuance of the writ.[29] If this is true, then writs of error of all kinds must be abolished in Mississippi, inasmuch as writs of error were dropped from this statute and expressly abolished in another. But conceding that it is a remedial writ within the contemplation of this statute, then it would seem that it could be issued by any judge of the Supreme, Chancery or Circuit courts in proper cases. Or considering that it is not within the statute but is simply analogous to the remedial writs therein provided, why may not the judgment of the lower court be appealed? At common law there could be a review if an issue could be resolved by a joinder in demurrer, which amounted to a final disposition. It was on account of the lack of this that appeals from *habeas corpus* must be statutory.[30] Now, there can be a joinder and judgment in demurrer in our hybrid *coram nobis*—in fact, that seems to be the only way to question it in most instances,[31] since when there is no writ actually issued a motion to quash it would be calculated to make the proponent feel rather self-conscious to say the least. And so the question arises as to whose common law the reference is to be made and the answer is a very uncommon common law which requires one to define the indefinable, describe the indescribable

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in a proper case, that the writ, when issued, operate as a *supersedeas.*" *Carraway* v. *State,* 163 Miss. 639, at 645.

[27] *Birch* v. *Triste,* 8 East, 412, 103 Eng. Rep. 401 (1807). ". . . in case, therefore, of error brought *coram nobis,* the practice is that the defendant in error shall move the court for leave to take out execution."

[28] *Hawie* v. *State, supra,* note 11.

[29] ". . . And the judges of said courts [circuit] and each of them shall have power either in vacation or term time to grant *writs* of *habeas corpus, mandamus, certiorari* and of *error* and *supersedeas,* and all other remedial writs returnable according to law into any or either of the said *circuit* couts." (Italics mine.) It is worthy of note that these are not writs of error returnable to the High Court of Errors and Appeals (See Note 6) and require no strained interpretation to include writs of error *coram nobis.* Judge Sharkey nowhere in the three cases he decided involving *coram nobis,* sought authority in the common law for their issuance.

[30] *Hallam* v. *People,* 32 Ill. 446, 83 Am. Dec. 286 (1863).

[31] *Hawie* v. *State, supra,* note 11 citing 5 Ency. of Pleading and Practice, 36, to substantiate: "by elementary rules of pleading the demurrer in this case admits all facts well stated or pleaded in the petition." ". . . the sole question presented is one of law. Does the petition state a case for relief?"

and unscrew the inscrutable—all because the court is dealing with one problem and talking in terms of another.[32]

Nevertheless, this article is not intended as an attack on any of the decisions of the court, nor on the use of *coram nobis*. It is simply an effort to call attention to the fact that the so-called law of *coram nobis* in Mississippi is not a development of a remedy and is entirely inexplicable as such but is rather a development in the judicial process as to matters of policy: (1) Finality of judgments; (2) Power of trial courts; (3) Respective spheres of judiciary and executive. Any other approach to the study of our *coram nobis* would be misleading because one can learn all the common law of England, Michigan, Indiana, New York, the federal courts, Mississippi, and all the jurisdictions without being able to answer in a given instance whether *coram nobis* would or would not lie. And the same person can cast aside all his information in this regard, devise a means of confronting the court with the issue of abuse of discretion by the trial court;[33] and if the humanities of

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[32] These are only a few illustrations of the procedural difficulties suggested by the Carraway case. Note that in the Hawie case, the question is: "Does the petition state a case for relief?"

[33] A very logical procedure would be the use of an injunction against the enforcement officer, which would put sharply in issue the inherent qualities of the original judgment. This was not permitted however, by the Supreme Court of Arkansas because equity had to do only with civil and property rights, and there was an adequate remedy by application to the court in which the conviction was had. *Ferguson* v. *Martineau,* 115 Ark. 317, 171 S. W. 472, Ann. Cas. 1916E, 421 (1915). The Mississippi court no doubt would hold the same way—see *Pleasants* v. *Smith,* 90 Miss. 440, 43 So. 475, 122 Am. St. Rep. 317 (1907); and Note, 9 L. R. A. (NS) 773 (1907)—though originally there could have been found more historic basis for the use of an injunction in criminal cases than *coram nobis.* (Historically, of course, in England, in criminal cases analogous to those wherein we find useful *coram nobis,* the procedure has always been for the judges to allow the judgment to stand and recommend clemency to the Crown, which was and is invariably granted upon such recommendations, because, after all, the judgment was the king's judgment and the king could do no wrong.) The Supreme Court of the United States has upheld *habeas corpus* in a case somewhat similar to the Carraway case, as to alleged grounds for relief, which is also quite logical. *Moore* v. *Dempsey,* 261 U. S. 86, 43 Sup. Ct. 265, 67 L. ed. 543 (1922). See also 11 *Neb. L. Bull.* 421 (1933).

The real objection to the use of injunctions or *habeas corpus* presumably, however, is the double jeopardy defense to any further proceedings after the relief is granted. For our own purposes if it were felt that this is a judicial, and not an executive function, it would seem that the rational procedure would be to cease speaking in terms of *coram nobis,* and make the motion under the authority of section 592 of the Code of 1930, which provides for new trials on such terms as the court shall direct, which in any case might be simply on the issue of newly discovered evidence excusably omitted, and which would be sworn to as any other motion involving fact *dehors* the record; if denied, to appeal under the authority of section 593 and cite numerous cases on abuse of discretion. If the Supreme Court denies the right to appeal, no matter what the reason assigned, there will be no need to write any treatises either on motions after adjournment or the inherent powers of courts over their own records; it will mean simply the same thing that *coram nobis* meant in the Carraway case —that the court didn't want to hear an appeal for one of the three reasons of

the case are sufficiently cogent, then a new chapter on *coram nobis* will be written differentiating that situation from the Carraway case. This should be the next turn, and when that has happened then we shall have fully arrived where we should have been in 1880.[34]

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policy assigned above. It is not a question of intrinsic qualities of motion or *coram nobis*. Judge Whitfield's *coram nobis* could have been made to cover anything from *habeas corpus* to *remittitur*.

[34] Once convinced of the propriety of the relief after considering the matters of policy involved, there need be no worry as to the mode of attaining it. The chief justice that delivered the wonderfully courageous, erudite and practical decision on partial reversals in the case of *Yazoo & R. Co.* v. *Scott,* 108 Miss. 871, 67 So. 491 (1914)—which is the thing actually desired in all *coram nobis* cases, (i.e., to let the judgment stand and have a partial resubmission)—will have no difficulty in fitting a rational process to the requirements, which will be more worthy of his usual forthrightness than the decision in *Carraway* v. *State, supra,* note 2.

THE VALIDITY OF BEQUESTS FOR MASSES*

LEWIS C. CASSIDY†

The purpose of this article is two-fold: 1. To present the historical English legal view of the mass; and 2. To summarize the several present-day solutions of bequests to say masses.

HISTORICAL

The most accessible and comprehensive discussion of the historical setting and present-day status of bequests for masses in England is the decision of the House of Lords in the case of *Bourne* v. *Keane*[1] in which the opinion was delivered by Lord Chancellor Birkenhead. Because of its great authority, this decision will be made the basis of the discussion which follows. "The common law," said the Lord Chancellor,

> "recognized the validity of gifts to establish masses. It would indeed have been strange if it had discouraged gifts in reinforcement of a religion recommended by its own doctrines. Two common law forms of tenure were recognized under which the duty of the landowner was to say masses. Co. Litt. s. 135 states that tenants in frankalmoign 'are bound of right before God to make orisons, prayers, masses and other divine services for the souls of their grantor or feoffor, and for the souls of their heires (ancestors) which are dead, and for the prosperity and good life and good health of the heires (children) which are alive.' "

Lord Coke's comment, written in the reign of James I, is

> "that not withstanding the changes in the liturgy the tenure in frankalmoign remaineth; and such prayers and divine service shall be said and celebrated as is now authorized: yea, though the tenure be in particular, as Littleton hereafter saith, viz., to sing a masse etc., or to sing a *placebo et dirige,* yet if the tenant saith the praiers now authorized it sufficeth."[2]

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*ED. NOTE—Any consideration of this subject in Mississippi will of course be controlled by the mortmain sections in the Mississippi Constitution of 1890. Under section 269 no real estate or money to be derived therefrom could be devised for the saying of masses. It is possible, however, that under section 270 personal property might be validly bequeathed to a priest (not a church or religious organization) for this purpose. Even this appears doubtful.

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[1] [1919] A. C. 815

[2] CO. LITT. s. 135.

Alluding to the changes wrought by the Reformation, Lord Birkenhead said:

> "No fundamental changes in doctrinal matters were made during the reign of Henry VIII. His disputes with the Pope were mainly on questions of jurisdiction, and, whatever powers may have been claimed by him or vested in him by statute, it is certain that the mass during the last year of his reign was in all essentials the same as that now observed by Roman Catholics. He himself in his will directed masses to be said for his soul (Froude's History of England, iv, p. 527.) There is no sufficient ground for impeaching the authenticity of this will."

It is important to note that in England the construction placed upon the Chantries Act of 1547[3] resulted in declaring all subsequent bequests to say masses invalid. Its title is "An Act whereby certain Chauntries Colleges Free Chapels and the possessions of the same be given to the King's Majesty." The evils to be corrected are set forth in the preamble:

> "Considering that a great part of superstition and errors in Christian religion hath been brought into the minds and estimations of men, by reason of the ignorance of their very true and perfect salvation through the death of Jesus Christ, and by devising and phantasing vain opinions of purgatory and masses satisfactory to be done for them which be departed, the which doctrine and vain opinion by nothing more is maintained and upholden, than by the abuse of trentals, chantries and other provisions made for the continuance of the said blindness and ignorance . . ."

Commenting upon this act, Lord Birkenhead said: "There is no trace of an intention to prohibit such gifts [for masses] in the future; and the preamble can not be construed so as to enact what Parliament did not in fact enact whether the omission was deliberate or by inadvertence."[4] The decision in the Bourne case reversed the construction placed upon the Chantries Act in *Adams and Lambert's Case*,[5] that the statute prohibited all superstitious uses. This construction was followed uniformly and the decision in *West* v. *Shuttleworth*,[6] decided in 1835, became the leading modern authority. Alluding to the many attempts to place the doctrine of superstitious uses upon a sound juridical basis, the Lord Chancellor said:

> "My Lords, I think that the plain truth of the matter is that when the Reformation became an accomplished fact the general

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[3] 1 Edw. 6, c. 14, 5 Statutes at Large (Pickering ed.) 267 (1763).
[4] *Supra* note 1, at p. 842.
[5] 4 Co. Rep. 96a, 76 Eng. Rep. 1079.
[6] 2 My. & K. 684, 39 Eng. Rep. 1106 (1835). This case held that a bequest for masses was superstitious and void.

notion was that only one form of religion could be safely allowed, and, therefore, there was an instinctive feeling that such gifts should not be permitted."[7]

As to what is a superstitious use, the Chancellor cited with approval the definition of Boyle: "A superstitious use may be defined generally to be one which has for its object the propagation or the rites of a religion not tolerated by law."

The conclusions reached by the Lord Chancellor follow:

"1. That at common law masses for the dead were not illegal, but on the contrary that dispositions of property to be devoted to procuring masses to be said or sung were recognized both by common law and by statute. 2. That at the time of the passing of I Edw. 6, c. 14, no Act or provision having the force of an Act made masses illegal. 3. That I Edw. 6, c. 14, did not itself make masses illegal, or provide that property might not thereafter be given for the purpose of procuring masses to be said or sung. It merely confiscated property then held for such and similar purposes. Subsequent legislation was passed to confiscate property afterwards settled to such uses. This is certainly true of I Eliz. c. 24 and may be true of I Geo. I, c. 50. 4. That as a result of the Acts of Uniformity, 1549 and 1559, masses became illegal. The saying or singing of masses was a penal offense from 1581 to 1791, and no Court could enforce uses or trust intended to be devoted to such uses. 5. That neither contemporaneous exposition of the statute I Edw. 6, c. 14, nor any doctrine closely related to it in point of date, placed upon it the construction adopted in *West* v. *Shuttleworth.* The principle of that decision is certainly affirmed in Duke and Roper on Legacies, but the authorities cited on its behalf not only do not support it, but in some cases contradict it. 6. That the substratum of the decisions which held such uses and trusts invalid perished as a consequence of the passing of the Catholic Relief Act, 1829, and thereafter your Lordships may give free play to the principle *cessante ratione legis cessat lex ipsa.* 7. That the current of decisions which held that such uses and trusts are *ipso facto* superstitious and void begins with *West* v. *Shuttleworth,* and is due to a misunderstanding of the old cases."

In view of the prominence given to the decision of *West* v. *Shuttleworth,* it is well to recall that the Master of the Rolls in that case, Sir C. Pepys, held that bequests in trust for the saying of masses was void, but that a bequest to Catholic clergymen in trust for the poor and ignorant inhabitants of Swale Dale and Wenston Dale was valid as constituting a charitable trust. It was only the first bequest that Lord Birkenhead held to have been founded on erroneous premises. The view of the Master of the Rolls is summed up in the following words used in his opinion:

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[7] *Supra* note 1, at p. 844.

"The legacies in question, therefore, are not within the terms of the statute Edw. 6, but the statute has been considered as establishing the illegality of certain gifts, and, amongst others, the giving legacies to priests to pray for the soul of the donor has, in many cases collected in Duke (p. 466) been decided to be within the superstitious uses to be suppressed by that statute. I am therefore of opinion that these legacies to priests and chapels are void."

The American Authorities

A consideration of many cases has not disclosed any decision in conflict with *Hoeffer* v. *Clogan*,[8] which, in upholding a bequest to an unincorporated society for masses observed that the Chantries Act "is of no force in this state and has never obtained in the United States. In this country there is absolute religious equality, and no discrimination in law is made between religious creeds or forms of worship." Even if the Act were a part of the law of the states, the bequest would have been valid on the Lord Chancellor's construction of it in the Bourne case.

If bequests for masses are held to be invalid in the several states several factual situations must be presented:

1. If A bequeathes $100 to B, a priest, to say masses for A's soul, B is a legatee and the words used are precatory, that testator believing that B as a matter of conscience and not of legal compulsion will say the masses. In other words no trust relationship is contemplated or provided for. This is especially true when there is no provision over for the legacy in the event that the masses are not said. This was held in the case of *In re Hamilton*,[9] where a bequest to a priest was held to be an absolute legacy and a bequest to a bishop a trust, although the bishop could say the masses himself.

2. If A bequeathes $100 to B to say masses, there is an attempt to create a private trust. In view of the fact that A is dead and he is to be the beneficiary, and no trust may exist without a beneficiary, there is no trust and the legacy is invalid. A deceased individual is not a person. This is the reasoning of Rappalo, J., in the formerly leading case of *Holland* v. *Alcock*,[10] and would apply even if the prayers were for all deceased and living persons. This case is not followed in later decisions of the Appellate Division of the New York Supreme Court

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[8] 171 Ill. 462, 49 N. E. 527, 63 Am. St. Rep. 241 (1898). The authorities are collected and reviewed in 5 R. C. L. 328; 2 Page, Wills (2d ed., 1926) 1757.

[9] 181 Cal. 758, 186 Pac. 587 (1919).

[10] 108 N. Y. 312, 16 N. E. 305 (1888).

since the act of 1893, which does not strike down such trusts on the ground of indefiniteness.[11]

3. If A bequeathes $100 to B to say masses a charitable trust ensues. It is held to be charitable because the mass according to the Catholic doctrine benefits both the living and the deceased as well as those who attend the public services.[12]

A consideration of the American authorities will show that an outright gift of property to another to say masses is valid as is a trust to say masses on the ground of its being charitable.[13]

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[11] *In re Zimmerman's Will,* 22 Misc. Rep. 411, 50 N. Y. Supp. 395 (1898).

[12] *Matter of Morris,* 227 N. Y. 141, 124 N. E. 724 (1920); *In re Cunningham's Estate,* 140 Misc. Rep. 91, 249 N. Y. Supp. 439 (1931); *Obrecht* v. *Pujos,* 206 Ky. 751, 268 S. W. 564 (1925).

[13] The case of *Festorazzi* v. *St. Joseph's Catholic Church,* 104 Ala. 327, 18 So. 394, 53 Am. St. Rep. 48 (1894), an early decision, discusses the private and charitable trust theories and concludes that no trust is created in that an indefinite number of persons are not benefited.

JUDICIAL ADMINISTRATION IN MISSISSIPPI

P. S. Sikes†

III

The Supreme Court*

The highest court under Mississippi's first constitution (1817) consisted of the same persons who presided over the trial courts of general jurisdiction.[1] The revised Constitution of 1832, however, provided for a separate and distinct "high court of errors and appeals."[2] This court consisted of three judges selected for six year terms by popular vote, one from each of three districts into which the state was divided. This appears to have been the first instance of an elective court of final appeal in the American Union. No change of importance was made in the state's highest court by the Constitution of 1869, except that judges were to be appointed instead of elected.[3]

As originally provided in the Constitution of 1890 (the present constitution of the state), the Supreme Court consisted of three judges, one from each of three districts into which the state was divided, appointed by the Governor and confirmed by the Senate for terms of nine years. In 1914 the Legislature submitted four proposed constitutional amendments to the people seeking to increase the number of Supreme Court judges, or justices, to six, to make them popularly elective, to change the terms of office from nine to eight years and to authorize the Court to sit in two divisions. All of the amendments were voted on favorably by the electors, and in 1916 the Legislature formally declared them parts of the constitution.[4]

The acceptance of the elective system for the justices of the present Supreme Court was the culmination of a movement, which set in soon after the present Constitution went into effect, for the re-establishment of the elective judiciary in the state. It is quite likely that a majority of the voters were in favor of elective judges even at the time the Constitution was adopted, but the appointive judiciary was continued as

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*This is the third and last of a series of articles on this subject. For previous installments see 6 Mississippi Law Journal, 109, 233.

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[1] *Constitution of Mississippi,* 1817, Art. V, § 2.

[2] *Ibid.,* 1832, Art. IV, § 1.

[3] *Ibid.,* 1869, Art. VI, § 2.

[4] *General Laws of Mississippi,* 1916, 211, 214, 216, 208 respectively.

it was under the Constitution of 1869—the "carpetbag" Constitution.[5] This action was perhaps taken as a safeguard to keep the negroes from securing any of the higher judicial offices.[6] The amendment permitting the Court to sit in two divisions was perhaps the most urgently needed amendment of the group.

By appropriate legislation the Legislature made provision in 1916 for the election, beginning of terms of office, filling of vacancies, *et cetera,* under the new amendments.[7] The nominations and elections take place at the time members of Congress are nominated and elected, respectively. The terms of office begin ordinarily on the first Monday in January following the elections. Vacancies are filled temporarily by appointment by the Governor with the provision that a person shall be elected to fill the vacancy at the next general election taking place at least five months after the vacancy occurs. Under these arrangements the possibility of a state judicial and general political election coinciding is reduced to a minimum.

Mississippi's experience with the elective Supreme Court since 1916 affords little comfort to those who oppose elective appellate courts on account of the uncertainty of the tenure of the judges. A defeated candidate for election to the Supreme Court, after having served a full term, is probably the rarest variety of "defeated candidate" in the state. There seems to be only one example of this kind. It is the writer's observation that the elective method of selecting Supreme Court judges is working satisfactorily in the state.[8]

A justice of the Supreme Court of Mississippi must be at least thirty years of age and must have been a practicing lawyer and citizen of the state at least five years immediately preceding his election. Judges of the Supreme Court may be removed by impeachment by the Legislature or "address" by the Governor and the Legislature.[9]

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[5] Eight years after the present Constitution was adopted an amendment was submitted to the people providing for the election, by popular vote, of supreme, circuit, and chancery court judges. *General Laws of Mississippi,* Special Session, 1898, 97-98. The amendment was thought to have been adopted by the voters, a majority of those voting on the question having voted for it, but it was declared invalid by the Supreme Court. *State* v. *Powell,* 77 Miss. 543 (1900).

[6] The peculiar arrangements for the election of the state executive officers and the classification of the legislative members—of the lower house—virtually assured white supremacy in the legislative and executive branches of the state government, regardless of what might be the fate of the new franchise provisions in the Constitution. See *Constitution of Mississippi,* 1890, §§ 140 and 254.

[7] *General Laws of Mississippi,* 1916, 224-26.

[8] The writer is not unaware of the movement in Mississippi to have Supreme Court, and other, judges selected by some method other than popular election The above statement was made in the light of Mississippi's own experience as shown from the facts studied. It does not necessarily follow that the writer believes the elective method is the best method of selecting judges.

[9] *Constitution of Mississippi,* 1890, §§ 50 and 53.

The state Supreme Court is required to hold two terms each year, at Jackson, and to remain in session at least nine months out of each year if the business before the court requires it. The terms begin in March and September. The justice who has been longest continuously a member of the court is designated chief justice.[10]

As stated in the Constitution "the Supreme Court shall have such jurisdiction as properly belongs to a court of appeals."[11] The Court has no original jurisdiction in the ordinary sense of this phrase. Its proper jurisdiction is only "to review and revise the judicial action of an inferior tribunal . . . and such incidental jurisdiction of a quasi-original character as is necessary to preserve its dignity and decorum and to give full and complete operation . . . to its appellate powers."[12] The Legislature cannot confer original jurisdiction upon the court, or jurisdiction which does not "properly belong to a court of appeals." The subject matter of a review must have been instituted and acted upon by some other court or tribunal clothed with judicial authority and acting in a judicial capacity. The Legislature attempted to authorize the Court to review orders issued by the railroad commission of the state, but the Court held that such a review was merely a method of securing an advisory opinion from the court which it could not render under the constitutional limitations upon it.[13]

The appellate jurisdiction of the Court is very extensive. With few exceptions it extends to all convictions of criminal offenses in the circuit court.[14] Appeal lies to the Supreme Court for either party in a controversy arising under the common law or in equity in the circuit or chancery court where the amount in controversy exceeds fifty dollars, exclusive of costs, or for the plaintiff if the difference between the demand and the judgment in his favor exceeds that amount.[15] Appeals may also be made in habeas corpus or contempt cases in either court.[16] In addition to these allowable appeals the state or a municipal corporation may appeal from a judgment of a circuit court in a criminal case under the following conditions: First, a judgment sustaining a demurrer to or quashing an indictment or affidavit charging a crime or misdemeanor; second, in cases of acquittal where a question of law has been decided adversely to the state or municipality—but only the question of law can be decided on appeal; third, in cases where the de-

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[10] *Mississippi Code,* 1930, § 3362.
[11] *Constitution of Mississippi,* 1890, § 146.
[12] *Robertson* v. *Southern Bitulithic Co.,* 129 Miss. 453 (1922).
[13] *Illinois Central R. R. Co.* v. *Dodd,* 105 Miss. 23 (1913).
[14] Exceptions are certain cases appealed from the county court. See *Mississippi Code,* 1930, § 705.
[15] *Ibid.,* § 13.
[16] *Ibid.,* §§ 15, 18, respectively.

fendant has been convicted and appeals and where a question of law has been decided adversely to the state or municipality the state or municipality may be treated as a cross appellant.[17] Appeals can be taken, ordinarily, from final judgments only.

The method of appeal to the Supreme Court is very simple. It is by petition. The petition for an appeal must be accompanied, ordinarily, by a satisfactory bond or cash deposit, the amount to be determined by the clerk or trial court, to cover the cost of the proceedings and to satisfy the judgment of the lower court. In criminal cases an appellant may subscribe to the "pauper's oath"—that is, take an oath that he is not able to furnish a bond or make the necessary deposit—although he will not be released from custody if he cannot furnish a bail bond. Certain felons—those convicted of treason, murder, rape, arson, burglary and robbery—are bailable only at the discretion of the trial judge, or the Supreme Court or a judge thereof; but other felons, and of course misdemeanants, are bailable of right.[18]

From the above discussion it appears that Mississippi has, with few exceptions, granted losing litigants and defendants an unrestricted privilege of appealing to the state's highest court. One does not wonder that it became necessary to appoint two special commissioners to assist the judges of the court,[19] and finally to increase the size of the Court and permit it to sit in two divisions, as was noted above. Even now, the fact that the Court keeps practically abreast of its docket is not conclusive proof that it is efficient or that there is no need of further restrictions on appeals.

The Supreme Court is given authority to make the ordinary rules under which its work is carried on and according to which appeals will be heard. In other words, although the law guarantees to practically all losing litigants, or defendants, rich and poor alike, the privilege of appealing their cases, the Court has wisely been given power to establish certain essential requirements for appellants to meet before they will be heard by the Court. That is to say, a person may be said to have, under the law, a right to an appeal but he may not have a right to have his appeal heard. Hence, in order to understand the actual conditions relative to the use of appeals to the Supreme Court, one must study some of the rules and practices of the court with respect to the cases before it. Certain of these will be noticed later.

The constitutional amendment, above referred to, permitting the Court to sit in two divisions reads as follows:

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[17] *Ibid.*, § 19.
[18] *Ibid.*, § 46.
[19] *General Laws of Mississippi,* Special Session, 1910, 158-59.

> "The Supreme Court shall have power, under such rules and regulations as it may adopt, to sit in two divisions of three judges each, any two of whom when convened shall form a quorum; each division shall have full power to hear and adjudge all causes that may be assigned to it by the court. In event the judges composing any division shall differ as to the judgment to be rendered in any case, or in event any judge of either division, within a time and in a manner to be fixed by the rules to be adopted by the Court, shall certify that in his opinion any decision of any division of the Court is in conflict with any prior decision of the Court or of any division thereof, the same shall then be considered and adjudged by the full court or a quorum thereof."[20]

Only cases involving the death penalty come before the full Court for argument under its present practice. Cases, however, that involve the declaration of a statute as unconstitutional must come before the Court, sitting *en banc* (both divisions sitting together), for consideration before the statute is declared unconstitutional. If a statute is held constitutional by one division then it is not necessary that it be heard by the full Court. In cases in which the three judges of a division cannot agree upon the judgments to be rendered the cases are considered *en banc*. It can thus be seen that there are never any dissenting opinions, or even dissenting votes, in cases finally adjudged by either division of the Court. A majority vote is necessary to reverse a decision of a lower court when the case is considered by the full bench.[21]

Mississippi has virtually two supreme courts in practice. A relatively small percentage of the cases are decided by the court *en banc*. Of 1,135 officially reported cases for the years 1926-28 inclusive, only 116 were decided by the full bench.[22] Apparently, the two-division Court is giving satisfaction. It has enabled the Court to more nearly keep abreast of its docket.

The Supreme Court acts only on the record made in the court from which a case is appealed. No attempt is made, or even allowed to be made, to get any information about the facts in dispute except that furnished by the official transcript of the record made below. The Court may render final judgment if a case is reversed unless there is a matter of fact to be ascertained, or damages to be assessed or an uncertain matter—in which case it may return the case "with instructions." In civil cases the Court may "affirm with a *remittitur*," that is,

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[20] *Constitution of Mississippi,* 1890, § 177b (amendment).

[21] For an excellent discussion of the matter considered in this paragraph, see A. B. Butts, "The Court System of Mississippi," 3, Mississippi Law Journal, 97-125, at 108-09 (1930).

[22] *Mississippi Supreme Court Reports,* Vols. 143-53 (1926-28).

the amount of a judgment is reduced but the judgment is otherwise affirmed.[23]

It appears that the Supreme Court might wisely exercise more power over cases coming before it. It takes "judicial notice" of certain facts not in the record. Why should it not make a judicial determination of other simple but necessary facts which are not included in the record? Professor Sunderland thinks that

> "there is nothing about an appellate court which should render it incapable of exercising such powers of a trial court as are convenient in connection with the review and final disposition of cases, such as passing on features of the case omitted by the trial court, and considering new matters not included in the case as tried. Such changes would place the appellate court in a position to render the maximum service in the administration of justice."[24]

The Court is required to write opinions "in all cases settling important principles, in cases to be remanded, and in all cases where the judgment or decree of the court below is reversed and in all felonies where the punishment prescribed is ten years or more."[25]

Under the rules of the Court any defeated litigant may, within fifteen days (thirty days if the Court wishes to extend the time) after an opinion is rendered, file a written suggestion of error of law or fact therein and the court will take such action as it deems proper. If the Court adjourns within the fifteen days after an opinion is rendered and a suggestion of error is filed with the clerk, the judgment cannot be executed until a majority of the judges certify in writing to the clerk that they are determined to overrule the suggestion of error. Otherwise it is heard at the next term of court.[26]

No reply is allowed to be made to a suggestion of error unless the Court by a special rule, or otherwise, calls for one. However, no suggestion of error will be sustained unless and until the adverse party has had an opportunity to reply to it. After the petition is overruled, or sustained, no other will be allowed to be filed.[27] During three years, 1926-28, 262 suggestions of error were filed in 1,135 officially reported cases. Only eight were fully sustained.[28]

Some idea about the work of the Supreme Court may be secured through a study of certain statistical records of the Court's work. It

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[23] *Mississippi Code,* 1930, § 3378. When the Supreme Court affirms the lower court's decision in a capital case, it sets the date for the execution. *Ibid.,* § 3396.

[24] Edson R. Sunderland, "The Problem of Appellate Review," 5 *Texas Law Review,* 126-48 at 144 (1927).

[25] *Mississippi Code,* 1930, § 3379.

[26] *Mississippi Supreme Court Rules,* No. 14 (161 Miss. 903).

[27] *Ibid.*

[28] See *supra,* note 22.

is the purpose at this point to present some of these data. This material was secured from the official reports of the court and covers the years 1926, 1927 and 1928.

A summary of the officially reported cases with the Court's action follows:

Chancery Court Cases	335
Affirmed	180
Reversed and remanded	70
Reversed and rendered	40
Reversed in part	29
Motions, etc., not involving merits of cases	16
Common Law Cases	488
Affirmed	210
Reversed and remanded	143
Reversed and dismissed	90
Reversed in part	26
Motions, etc., not involving merits	19
Criminal Cases	312
Affirmed	180
Reversed and remanded	93
Reversed and dismissed	21
Reversed in part (usually excessive penalty)	12
Motions, etc., not involving merits	6

In the common law cases it will be noticed that almost fifty percent of the number were reversed. The grounds for reversal were as follows:

Erroneous application of the law to the facts	74
Erroneous instructions to the jury	32
Failure to instruct for the defendant (peremptory)	24
Erroneous interpretation of a law	14
Not submitting question to jury	13
Erroneous admission of evidence	10
Not directing a verdict for plaintiff	9
Error in connection with the pleadings	8
Sustaining a demurrer	7
Granting a writ of mandamus	5
Instructing for defendant	4
Evidence not justifying verdict	4
Miscellaneous, including requiring plaintiff to obtain a bill of particulars, overruling a demurrer, etc.	19

It is of interest to observe that in a majority of those cases reversed in full in the list last given, the reversals were not based on what might be called technical grounds. There were some of the latter, it is true; but generally when a case was reversed it was on account of an error of judgment by the trial judge. With good attorneys on each side

it is very difficult for the trial judge (or perhaps, more accurately, the judge on trial) under our system to keep from committing an error of some kind.

The reversals in full in criminal cases were as follows:

Error in admitting or rejecting instructions	12
Illegal search (without search warrant)	9
Illegal search warrant	7
Error in the indictment or affidavit	6
Failure of justice of the peace to send up a transcript or certificate	6
Failure to prove the venue in the case	5
Grand jury improperly drawn	3
Failure of minutes to show an "order" of the court	2
Error in drawing jury panel	2
Insufficient evidence	21
Erroneous admission of evidence	19
Overruling a demurrer (State appealed)	4
Erroneous exclusion of evidence	3
Miscellaneous, including remarks by prosecutor, failure to grant a continuance, issuing a writ of habeas corpus, accepting juror over objection, etc.	15

It will be noted that the errors given in the first nine lines in the above list of cases were what might be considered technical errors. In some of these cases the Supreme Court stated frankly that the evidence indicated that the defendants were guilty. From a study of the cases it appears to this writer that justice would have been more certain and speedy if the Supreme Court had ignored the technical errors in at least a majority of these cases and decided them against the defendants and in favor of the people and taxpayers, just as it took matters into its own hands in twenty-one cases (reversed for insufficient evidence) and decided against the people and in favor of convicted persons. A few specific examples may be examined with profit. In the five cases in which the venue was not properly proved every detail in the cases indicated that the criminal acts were committed in the jurisdictions in which the trials were respectively held. The prosecutor, however, failed to have the exact name of the district or county concerned brought out in the testimony in each case. When the cases came to the Supreme Court objections were made because of these very "grave errors," and as a result additional trials were made necessary. It is difficult to see how an error of this sort can prejudice a defendant on trial. Very likely the defendants' own lawyers were not aware of the errors until the trials were completed; but it is held that these "jurisdictional errors" can be raised first on appeal.[29]

[29] See *past*, notes 37 and 38.

The number of cases of a particular kind coming before the Supreme Court, or reversed by that Court, may not be impressive. But as one writer has said,

> "We must not conclude from this, . . . that the Supreme Court's place in law administration is correspondingly unimportant . . . The influence of a particular decision transcends its particular significance. The Supreme Court speaks with authority, and trial courts, prosecuting officers and lawyers throughout the states, must and do heed its opinions."[30]

A special committee of the State Bar Association stated in 1918: "Our system [of courts] has during the history of the state, given general satisfaction and kept our judiciary as spotless as any in the whole world."[31] However, this optimistic statement cannot be taken as indicative of the general feeling, even among members of the legal profession, toward the state's judicial system and its work.

It is proposed at this point to study certain features of the work of the Supreme Court in the light of reported cases and of certain comments by eminent persons. This inquiry will be made with one purpose paramount—namely, to try to determine whether the present practices of the Court result in the highest degree of justice in cases brought before it, or through its influence, in contests in the lower courts. The following subjects will be briefly considered: First, the use of the suggestion of error; second, the volume of reported cases; third, the Court's interpretation of legislation; and finally, the Court's attitude toward legal and technical rules in its own practice.

The Court's attitude toward the use of the suggestion of error has been severely criticised—perhaps justly. As stated above, there were 1,135 officially reported opinions of the Court during the three years 1926-28. In 262 of these, additional opinions on suggestions of error were reported. Only eight suggestions of error were fully sustained, including no criminal cases. There are perhaps sentimentalists who would say that justice is priceless and that all of the time spent by the Court in considering these suggestions of error was well spent because it prevented miscarriages of justice in a few instances. By the same logic it might be argued that all cases should be reviewed by the Supreme Court because in those appealed the court often finds "obvious miscarriages of justice" and hence, the lower courts are not competent to finally dispose of any cases. Furthermore, one cannot be absolutely sure that the judgments on suggestions of error were

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[30] A. J. Harno, "The Supreme Court in Felony Cases," *Illinois Crime Survey,* 113-189 at 114 (1929).

[31] "Report of the Committee on Objections to a Unified Court Plan," *Reports of Mississippi State Bar Association,* XIII, 125-140 at 126 (1918).

correct in the few cases in which the suggestions were sustained. At least, there must have been convincing evidence to the contrary, since the Court decided them differently on the first hearings.

In general, it may be said that the Court seeks to prevent any abuse of the privilege of the suggestion of error. Its attitude is expressed in the following statement:

> "The court will rarely consider new points for the first time presented on a suggestion of error and, for the stronger reason, it will be a much rarer case when the Court will entertain a suggestion of error presented on behalf of a party who filed no brief and made no argument on the original submission, and who, up to the time of the decision of the case on appeal, had paid no attention to the appeal."[32]

Several years ago a committee of the State Bar Association strongly condemned the suggestion of error as used before the Supreme Court, and suggested the adoption of a rule similar to that used by the United States Supreme Court. To a layman it appears, as it also seemed to appear to the bar committee, that it would be possible for the Supreme Court to take some action with respect to the use of the suggestion of error which would save the time of the court and at the same time put an end to much unnecessarily drawn out litigation.

There has been for a number of years some criticism of—or one might say apprehension concerning—the increasing volume of reports of the appellate courts of the states and nation. Over twenty-five years ago Judge Baldwin wrote:

> "It [repressing cases from reports] cuts into a cumulative mass of material, most of which must, in any event, so far as points of law are concerned, be a mere repetition of twice-told tales, that is becoming so vast in the United States as to becloud rather than illuminate whoever seeks to know what American law really is."[33]

Justice Orrin C. Carter, formerly of the Supreme Court of Illinois, thinks "the difficulty in writing a brief or an opinion is not in having too few to which to refer, but in having too many."[34]

The officially reported cases of the Mississippi Supreme Court for the three years 1926-28 fill slightly more than ten large volumes of at least 900 pages each, or approximately 9,000 pages of printed matter. Of course, some of this space is filled with briefs, syllabi and statements of cases, but the greater part of it consists of court opinions. There

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[32] *McCaskey Register Co.* v. *Swor et al.,* 154 Miss. 396, 400 (1929).
[33] Simeon E. Baldwin, *The American Judiciary,* 274 (1905).
[34] "Methods of Work in Courts of Review," 12 *Illinois Law Review,* 231-59 at 241 (1917).

seems to be no good reason why it would not be possible to reduce greatly the number of cases officially reported and also the length of many of the opinions, without detracting from the value of the state's case law. Such reductions would reduce expense and also save the time of attorneys and others interested in reading and using the reports.

To show that poor judgment is exercised in selecting cases to be officially reported, an examination of a group of opinions involving the question of "venue" has been made. Under the *Codes of* 1880[35] and 1892[36] the failure of the state to prove venue could not be first raised on appeal to the Supreme Court. But the *Code of* 1906 provided that questions "jurisdictional in character" might be first raised on appeal to this court.[37] Several cases involving this question have been before the court since that time and the opinions have been officially reported in a large group of them.[38] In this group of cases official opinions might be justifiable on the ground that other points of law were involved in the cases. However, there have been several other cases officially reported, some in very recent years, which involved the one single point which was so well covered in the Monroe case.[39] In the last two cases cited the charges were the same and the errors were identical. Naturally the opinions were very similar, and they were handed down within a week of each other. It is quite evident that neither added any "light" to the other nor to the growing list of similar cases but both were officially reported. They certainly exemplify the "twice-told-tale" feature of the rapidly growing case law of the state.

The lawyers of the state appreciate the fact that more care should be exercised in selecting cases to be put into the offcial reports, as well as in the writing of the opinions by the judges. A committee of the State Bar Association made the statement in its report that "much that is published [in the *Supreme Court Reports*] is but a repetition of principles which have been fully established heretofore."[40]

The responsibility for the excessive length or number of officially reported cases must, in the final analysis, be placed upon the members

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[35] *Mississippi Code,* 1880, § 1407.
[36] *Ibid.,* 1892, § 4347.
[37] *Ibid.,* 1906, § 4936.
[38] *Monroe* v. *State,* 103 Miss. 759 (1913); *Kyle* v. *Calhoun City,* 123 Miss. 542 (1920); *Brasham* v. *State,* 140 Miss. 712 (1925); *Griffin* v. *State,* 140 Miss. 175 (1925).
[39] *Horton* v. *State,* 123 Miss. 525 (1920); *Norwood* v. *State,* 129 Miss. 813 (1922); *Slaton* v. *State,* 134 Miss. 419 (1924); *Dodson* v. *State,* 151 Miss. 548 (1928); *Crosby* v. *State,* 151 Miss. 512 (1928).
[40] "Report of the Committee on Jurisprudence and Law Reform," *Reports of Mississippi State Bar Association,* XI, 18-21 (1916).

of the Supreme Court themselves. They, and they only, can reduce the length of the opinions of the Court, and they are in position to see that only intrinsically important opinions are placed in the official reports. In this connection it is interesting to note that in 1,135 officially reported opinions during a three year period forty-three covered less than one page each and of these the Chief Justice wrote twenty-three. One of Chief Justice Smith's opinions contained only six words; another, four lines; three others, five lines each; and a sixth contained seven lines. Opinions like these, if they must be reported, will do much toward simplifying the case law of the state and toward reducing the volume of reported cases. It is much more refreshing, at least to this writer, to read a brief opinion of this sort than one that reads like a Fourth of July oration extolling the bill of rights or the sacredness of trial by jury.[41] It is entirely within the discretion of the justices to reduce the amount of reading they put in the opinions. Likewise the justices can determine which opinions shall be officially reported. The law charges them, or a part of their number, to assist in the selection of cases to be officially reported. It is they who appoint the reporter and they have the power to remove him. Hence, if the state is to have any relief from the excessive amount of "case law," under the present statutory law, it will have to look to the Supreme Court justices for it.

Upon certain occasions the Supreme Court apparently seeks primarily to do justice as it sees it from the facts presented in the record. Upon other occasions the Court seems to give apparent justice only a secondary consideration in holding that the Court must follow the law as it is laid down. It attempts to justify this latter course by holding that it is not for the Court to make the law but only to apply the law as it is determined by a legislative or constituent assembly. It is the purpose here to show that the Court does look beyond the legal provisions and to the actual facts at times, and that it closes its eyes to these external facts at other times. In other words, the Court seems to consider itself a court of justice at one time and a court of law at another.

An illustration of the Court's refusal to follow the actual words of a law is furnished in the case of *Parchman* v. *Mobile and Ohio Railroad Co.*[42] Under the so-called *prima facie* statute of the state it was provided, among other things, that if a person were injured or

[41] The writer does not mean to imply that he thinks there is never an occasion for a very long opinion. Long, well reasoned, and well written opinions in cases of general importance are no doubt justifiable.

[42] 143 Miss. 726 (1926).

killed by a railway car moved by steam, electricity, gasoline or lever power, it should be presumed that such injury or death was a result of the negligence of the railway company.[43] In the instant case it was shown that a person had been killed as a result of being run over by a railway car set in motion as a result of the application of "lever power" by the use of pinch bars in the hands of railway employees. The lower court had refused to hold that this kind of "lever power" was included in the above statute, and the full Court on appeal, evenly divided, affirmed the action of the lower court. That is, the Court here made the application of the law it thought the Legislature "intended" to write and not what was actually written into the statute books.

No doubt the Court was correct in the above case in its assumption of what the Legislature intended to say. However, in the case of *Kimbrough* v. *Powell,*[44] the Court seemed to be interested only in what the Legislature had actually said, even though a strict application of the law resulted in an inequitable decision. The law which the Court was asked to apply provided as follows:

> "Every citizen of this state, male or female, being a householder, and having a family, shall be entitled to hold, exempt from seizure or sale, under execution or attachment, lands and buildings owned and occupied as a residence, by him or her." (With certain provisions as to maximum amount of land or value of city property.)[45]

In 1914 this provision was amended so that a husband or wife, widower or widow, over sixty years of age, who had been exempt under the code provision, would not be deprived of such exemption on account of failure to occupy the homestead.[46] In the Kimbrough case the Supreme Court held that a woman coming into possession of a homestead as a result of her husband's death and after reaching the age of sixty years, would not enjoy the exemptions where she had no dependent and did not occupy the homestead. There is no criticism here of the Court's legal reasoning in justification of its decision. However, it is doubtful whether the lawmakers intended that an old woman past sixty years of age, who had been the dependent entitling the husband to an exemption, under the law, on the common homestead, should not be given exemption equal to that given to the one upon whom she had been dependent. If the husband had died before the wife reached the age of sixty the latter might have enjoyed the

[43] *Hemingway's Mississippi Code,* 1917, § 1645.
[44] 143 Miss. 498 (1926).
[45] *Mississippi Code,* 1906, § 2146.
[46] *General Laws of Mississippi,* 1914, 290.

same privileges of exemption that he had enjoyed; but when the death of the husband occurred after the wife reached that age the latter did not enjoy these equal privileges. It is not reasonable to believe that the Legislature really intended for this to be the case. If the Court was justified in assuming in the Parchman case what the Legislature intended to say but did not actually say, then it seems that it would have been justified in the present case in giving a more equitable construction to the statute.

Two other cases afford an excellent contrast of the Supreme Court's reaction toward the actual provisions of laws under different circumstances. In 1926 the Legislature enacted a law requiring every automobile owner to purchase a license tag in December of each year for the following year, or in the month in which the automobile was purchased.[47] Failure to purchase a tag in time would make a person liable to a penalty of 100 percent of the price of the tag. For some reason the tags were not available in December 1926 and consequently no one purchased his tag during that month. A mandamus suit was brought against a sheriff to compel him to assess automobile owners with the penalty when they applied for tags in 1927. The lower court refused to issue the writ and an appeal was taken to the Supreme Court. The lower court's action was affirmed, the Supreme Court saying (in part):

> "The law does not require the doing of an impossible thing, and a statute should not be construed to require of a person the performance of duties which are rendered impossible of performance by reason of causes for which he is in no way responsible, and which he is powerless to change or remove."[48]

This was apparently a very sensible view for the Court to take. However, the Court does not seem to have followed this same liberal policy in another case coming before it a little later. The law specifically required that an appeal from a justice of the peace court must be taken and a bond made within ten days after a judgment is rendered, if an appeal is to be taken.[49] In a case in a justice of the peace court in 1927, the losing party asked for an appeal and made the required bond. Before he could deliver the bond to the justice of the peace the flood waters of the Mississippi River forced the justice to leave his office and flee from the town, thus preventing the delivery of the bond though the justice approved it by telephone. The bond was delivered sometime after the ten day period was up and a motion

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[47] *Ibid.*, 1926, 188-98.
[48] *Boyd* v. *Coleman,* 146 Miss. 449 (1927).
[49] *Hemingway's Mississippi Code,* 1927, § 63.

was made to dismiss the appeal because of this failure to deliver the bond within the period required by law. The county court, to which the appeal was taken, overruled the motion to dismiss, but was reversed in this by the circuit court and the latter was affirmed on appeal to the Supreme Court.[50] The letter of the law was the guide for the Supreme Court in this case.

Another case in which the Supreme Court took a liberal view on a legal provision was that of *Lauderdale County* v. *Wilson*.[51] A chancellor had granted an injunction to prevent the spending of certain money by a county board of supervisors for the construction of a highway along a route different from the route specified in the order calling the election at which the bonds for raising the money were authorized. In reversing the decree of the chancellor, the Supreme Court held that the board had a right to change the route where the "dominant" provisions of the statute were met. It is clearly evident that the high court wanted to uphold the proposed change made by the board in this case. "To hold otherwise," the Court said, "might defeat the construction of any improved road connecting with the two points, Meridian and Louisville." The Court was probably justified in taking the view it did, and finding a basis for the view it took, but a strict legal view would have forced it to make a different disposition of the matter.

A year before the last case was decided by the Supreme Court, a strict legal view of a matter had prevented the construction of an, apparently much needed, highway. By an act of the Legislature any county was authorized to construct certain highways in other counties where it appeared necessary for the convenience of its own citizens.[52] The law required that such a highway should be paid for from the "general funds" of the county. Warren county sought to take advantage of the law and attempted to raise the money through a bond issue. An injunction was asked for by a taxpayer of the county to restrain the floating of the bonds. The chancellor refused to grant the injunction, holding that "general funds" could be construed so as to include money raised from a bond issue. Upon appeal to the Supreme Court, however, the chancellor was reversed.[53] The appellate court agreed that the need was urgent but said the law did not authorize a bond issue for such a purpose. "The Court," it said, "can-

[50] *Lamas* v. *Renaldo,* 151 Miss. 325 (1928). It can be said in vindication of the Supreme Court's action in this case that there was apparently some negligence on the part of the plaintiff after conditions had become normal in the community.
[51] 148 Miss. 316 (1927).
[52] *General Laws of Mississippi,* 1924, 319.
[53] *Williamson* v. *Warren County,* 146 Miss. 727 (1927).

not change the law to meet even this urgent necessity, but must adhere to the law as it is written." It is submitted that if the same liberal attitude had been taken in this case as was taken in the Lauderdale county case, the decision would probably have been different. In view of the Supreme Court's own statements in these two cases one might ask: When does the Court have the right to change the law to meet the conditions, and when must it follow the law regardless of the conditions?

From the cases cited and discussed in the last several paragraphs, it appears that the Supreme Court attempts at times to administer justice in spite of legal provisions. At other times it is content to follow the principle of *stare decisis,* the "authorities," or the strict letter of the law, and to let simple justice, as shown by obvious and often admitted facts, count for naught. The following statement by Professor Raymond Moley, a prominent assistant of President Roosevelt, is of interest in this connection:

> "The reason selected by the appellate court on the basis of which it grants a new trial or reverses a verdict outright may not be the real reason at all. An appellate court may be denied the right of reviewing the merits of a case, but a reading of the record convinces the judges that substantial injustice has been done. A decision is handed down that looks as if technical considerations are paramount, but really a substantial injustice is being remedied by a technical gesture. It has never been hard for appellate courts to wear the livery of legalism in serving the substantial ends of justice."[54]

It may, with equal truth, be said that the appellate courts seemingly ignore actual errors when they are convinced from the facts, as disclosed by the record before them, that substantial justice has been done. At least this seems to be the case on some occasions.

It would perhaps not be possible to show conclusively that the Supreme Court of Mississippi uses the "technical gesture" to do "substantial justice." The above-discussed cases, however, do lend credence to the belief that this court is often prompted by considerations of justice in construing laws; but at other times it is not so clear that "substantial justice" is foremost in the minds of the justices.

From this conclusion we can turn logically to a group of cases bearing more directly upon so-called technicalities. In these cases we hope to show that the Court is willing at times to brush aside established rules of practice, ignore technicalities, or disregard plain provisions of procedural law in order to prevent failures or miscarriages

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[54] *Our Criminal Courts* (New York, 1930).

of justice. On the other hand, an attempt will be made to show that the Court will, on other occasions, apparently barricade itself behind those same rules, technicalities, or legal provisions and allow obvious miscarriages or failures of justice to prevail.

In the case of *Wade* v. *State*,[55] a murder case, the Supreme Court refused to reverse a conviction where under the rule of *stare decisis* a reversal would seem to have been justifiable. The chief ground relied on for a reversal was the admission in evidence of a dying declaration. The objection to the evidence was that the declarant, the victim of the murder, asked for a doctor after he had made the declaration. In a case very similar to the present one a lower court's decision had been reversed where it was shown that a declarant had asked someone to pray for him after making the declaration. The Court said in the latter case that the fact that the person asked for prayer indicated that he had not despaired of life. It is difficult to see why asking for a doctor would not be construed as indicating a hope for life, if asking for prayer were so construed. In the Wade case the evidence, even aside from the dying declaration, was convincing and no doubt this was a decisive factor in causing four of the six justices of the court to vote to affirm the case, when a liberal application of the so-called principle of *stare decisis* might have been applied to bring about a reversal.

A case in which the court could have easily justified a reversal on a technical ground is that of *Crawford* v. *State*.[56] Crawford was charged in the circuit court with an "indecent assault" upon a female child. He demurred to the indictment on the ground that no crime was charged. The demurrer was overruled and he was placed on trial and convicted. Upon appeal, the Supreme Court admitted, Chief Justice Smith writing the opinion, that there was no such crime as indecent assault at common law nor under the statutory laws of the state, but held that a simple assault was proved and that the word "indecent" in the indictment was surplusage. This case very positively demonstrates a liberal attitude on the part of the Supreme Court. The Court might even be charged with bending backward to show a flash of liberalism, for it said in its opinion: "We may say in passing that the record before us reflects rather an unsound and weak case."

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[55] 147 Miss. 479 (1927). The above quoted statement by Professor Moley seems to be thoroughly substantiated by the decision in this case. The distinction the court made between this case and that of *Haney* v. *State*, 129 Miss. 486 (1922) (in which a declarant had asked for prayer) may not be entirely satisfactory to a theologian, but the court succeeded in wearing the "livery of legalism" and apparently served the "substantial ends of justice."

[56] 146 Miss. 540 (1927).

If such an attitude were assumed in all criminal cases, there would no doubt be fewer guilty criminals who would appeal their cases to the Court, hoping to escape punishment through some technical loophole.

The Supreme Court showed a willingness in the case of *Butler* v. *State*,[57] to disregard the strict letter of the law and reverse a case in which there were no actual errors of law shown in the record. In this case certain testimony was admitted which the appellate court thought was prejudicial to the defendant (appellant). No objection was made, by the defendant or his attorney, to the admission of the testimony, and legally it could not be objected to on appeal. Nevertheless, the Supreme Court was of the opinion that the defendant had not had a fair trial and, in spite of his failure properly to preserve his legal right to a full review on appeal, the case was remanded for a new trial.

In civil cases, also, the Supreme Court appears sometimes to look beyond legal "shams and frills" and to decide cases on their actual merits. In *Hemmings* v. *Rawlings*,[58] a judgment for $5,000 had been given an employee in an action for damages brought against the employer, and the defendant appealed. The principal ground argued for a reversal was an alleged erroneous instruction given for the plaintiff by the trial judge. The appellate court admitted that the giving of the instruction was erroneous, but held that the completed record together with the instructions did not indicate that there had been any miscarriage of justice. The judgment was affirmed.

The Supreme Court seemed to have looked directly at the merits in a controversy in which the city of Jackson was sued for damages by a person who had been injured as a result of a defective street.[59] In this case the city appealed after the trial court had found for the plaintiff. Again an objection was made to an instruction given by the lower court for the plaintiff. The Supreme Court agreed that the instruction was bad, but held that "one bad instruction may be cured by the character of the testimony which leaves no doubt as to what the fact in dispute is." In this case, and the one immediately above, apparently the Supreme Court was convinced from the facts that the cases had been correctly decided and refused to disturb these findings even though there were technical errors that might have justified reversals.

In the case of *New Orleans and Northeastern Railroad Company v. Snelgrove*[60] the Supreme Court virtually supplanted the trial jury as

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[57] 146 Miss. 505 (1927).
[58] 144 Miss. 643 (1926).
[59] *City of Jackson* v. *Lewis*, 142 Miss. 806 (1926).
[60] 148 Miss. 890 (1927).

a trier of facts. Snelgrove was injured while employed by the railroad company. In a suit for damages he was awarded a judgment for $50,000 by the trial court. The railroad company appealed the case to the Supreme Court. This Court refused to reverse the case outright although it stated in its opinion that the verdict of the jury was a result of passion. Apparently, the Court thought passion discounted at forty-five percent equals justice, for it affirmed the case with a *remittitur* in the amount of $22,500.

Where a party in a civil suit fails properly to preserve his full legal right to be heard on appeal the Supreme Court may nevertheless come to his rescue to prevent what it believes is a miscarriage of justice. Such was the case in *Flowers* v. *Stringer*.[61] The defendant permitted the case to go to the jury without moving for a directed verdict.[62] The jury found for the plaintiff but on appeal to the Supreme Court the case was reversed and remanded for a new trial because, it was held, the jury's verdict was contrary to the weight of evidence.

The last several cases discussed indicate that the Supreme Court is sometimes inclined to break away from the ordinary "judicial formalism" to bring about what appears to it to be more certain or more speedy justice. It must not be supposed, however, that the Court is always willing to proceed in this manner. The cases to be considered next tend to show that the Court often closes its eyes to the obvious course of justice in cases and follows a course that apparently results in the miscarriage, delay, or failure of justice.

Prosecuting officers in Mississippi should know when a hog is, or is not, a hog. The case of *Rainwater* v. *State*,[63] teaches this lesson in law enforcement. The indictment in this case read, in part, as follows:

> "Henry Rainwater, in the said county, on the —— day of ——, in the month of ——, 1929, did unlawfully and feloniously take, steal, and carry away two hogs . . . Contrary to the form of the statute . . ."

Rainwater was tried and convicted. On appeal to the Supreme Court it was stated by the Court that "the proof showed without dispute that he killed the hogs in Alabama, and brought the meat of the hogs into Greene county, Mississippi." But, the Court held, under this proof the thing stolen, so far as it affected Mississippi, was "meat" and not hogs. Because of this "fatal variance" the case was reversed

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[61] 152 Miss. 897 (1929).

[62] The proper procedure in the case would have been for the defendant to move for a directed verdict. Failing this, he could claim no further rights on appeal on questions of fact after the jury decided against him.

[63] 155 Miss. 684 (1929).

and remanded for a new trial. There can be little doubt but that the defendant in this case well knew the nature of the crime for which he was charged. The court had good "authority" for the course it took in this case,[64] but if it is just to convict a man for a crime which does not exist under the laws of the state, and to uphold the conviction "because the proof showed that a crime was committed," then it seems that no injustice would result (to a defendant) in upholding the conviction of a person charged with stealing two hogs where it is proved that he actually stole (as affecting this state) the meat or carcasses of the two hogs.

The Supreme Court took a very technical view in the case of *Davis* v. *State*.[65] The record in this case showed that Davis was indicted for the killing of Ernest Jones. On the trial it developed that the person killed bore the name "Man" Jones instead of "Ernest" Jones. In due time the district attorney asked for permission to amend the indictment so as to correct this defect. The proper order was given by the trial judge and the name "Ernest" was erased from the indictment and the name "Man" written in its place. The clerk failed, however, to enter the court's order in the minutes and this was assigned as error on appeal. In sending the case back for a new trial the appeal court said:

> "True it is that the evidence shows "Man" Jones was killed, but the indictment and judgment would disclose that Manual Davis, the defendant, was convicted of the murder of Ernest Jones. If the order had been entered in the minutes, then the record would have disclosed the identity of the person and of the offense."

Thus the people of the county in which this case was originated were forced to bear the expense of a new trial in a court which costs one dollar a minute to operate, according to a recent statement by a prominent judge of the court.[66] The question of the guilt or innocence of the accused did not enter into this decision. If the Supreme Court has power to uphold a verdict of a jury reached as a result of passion, and simply to order the lower court to reduce the money judgment given, it seems reasonable to assume that the Court should have power to uphold an unquestioned verdict of a jury in a criminal case, and to order the lower court to make a correction in its record. At least it does not seem fair to lay all the blame for the high cost of government on the shoulders of the executive and legislative departments, as is so often done.

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[64] See 36 Corpus Juris 1856, cited by the court.
[65] 150 Miss. 797 (1928).
[66] Circuit Judge W. J. Pack, quoted in the *Jackson Daily News,* February 13, 1933.

Other cases illustrating the failure of justice in cases before the Supreme Court were given in another connection.[67] Where the Court attempts to decide all cases, or at least a large number of cases, according to rigid technical rules and to follow the principle of *stare decisis,* the law will continue to become more and more uncertain. The Court's own words support this statement. In considering the question of competency of jurors as shown by their *voir dire* examination, the court said:

> "It is somewhat difficult to draw a line of demarcation between the cases and to harmonize entirely all the utterances of the Court upon the subject. Much, of course, depends upon the particular question propounded and the answer given in each particular case."[68]

Suggestions for Reform. Any plan for judicial reform must take into consideration the influence and power which the appellate court has over the work of the trial courts. The Supreme Court of Mississippi seems to be in need of a certain amount of reform. No doubt there are certain legal and constitutional changes that could be made to increase the efficiency and effectiveness of the Supreme Court. It should be given, for example, first, the power to dispose finally of more cases, especially after taking testimony or conducting inquiries to clear up doubtful points; second, greater powers of supervision over the work of the lower courts; third, the power to limit the number of cases to which it gives full hearings, or hearings at all, through the use of the writ of *certiorari* or a petition as used now by the Supreme Court of the United States.

It is the writer's opinion, however, that with a more aggressive and liberal attitude on the part of the state's high court of appeal with the powers it already possesses it can go a long way toward putting the state's "judicial house" in order. A simple illustration will be given to show that the Supreme Court has the power to reform if it has the will to do it. In 1912 the Supreme Court formulated, among others, the following rule:

> "No judgment shall be reversed on the ground of misdirection to the jury, or the improper admission or exclusion of evidence, or

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[67] See the first of this series of articles, 6 MISSISSIPPI LAW JOURNAL, 109 (February, 1934).

[68] *Donahue* v. *State,* 142 Miss. 20 at p. 40 (1926). The learned justice might have added that much depends also upon the particular judge or judges deciding the case. Courts of appeal may resent allegations that personal factors—bias, prejudice, training, etc.—influence their decisions in particular cases. Nevertheless, no one ever attempts to predict a decision even of that august tribunal, the Supreme Court of the United States, without considering the so-called "liberal" and "conservative" justices along with legal provisions and past decisions of the Court.

for error as to the matter of pleading and practice, unless it shall affirmatively appear, from the whole record that such judgment has resulted in a miscarriage of justice."[69]

It is submitted that if this rule were wisely and liberally applied, there would be little need for reversing a case on a so-called technicality, and thus denying or delaying justice in an obviously clear case. Speaking before a convention of the State Bar Association in 1913, President R. N. Miller said with respect to the above-quoted rule:

> "I most respectfully submit for the serious consideration of the Bar of Mississippi that this rule, literally interpreted, applied by even so able and fairminded a Court as now composes that august tribunal, is in fact revolutionary . . .
>
> "It sweeps away at one full swoop the doctrine of *stare decisis* which lies at the very foundation of the justice of all jurisprudence . . .
>
> "I think I know, too, that a vast majority of the Bar of Mississippi are unalterably opposed to the literal interpretation and enforcement of the rules above-named if they would express their secret and inmost thoughts and desires, and it is for this association to say whether these rules of the Supreme Court shall be approved by the bar or not."[70]

The bar members apparently had their way, that is, if President Miller rightly judged their "inmost thoughts and desires." The Supreme Court had little difficulty in explaining that the above rule was not at all revolutionary. It answered an eloquent plea on a suggestion of error in the case of *Jones* v. *State*,[71] in which the attorney quoted at length from the address of President Miller, by showing that the rule was simply an embodiment of an old common law principle which had been followed by the state's Supreme Court on many occasions. It also very significantly pointed out that the mother country of our jurisprudence (England) had carried the principle to a much greater extreme than had any state in this country, yet without destroying the principles of *stare decisis* in its jurisprudence. In view of the fact that most of the appealed cases studied in this and preceding articles have been before the Supreme Court since the rule was promulgated, it is not difficult to see that the rule has not been "liberally" applied, or is not revolutionary in character. The Court could, however, have followed the lead of the English appellate courts and applied the rule literally, or liberally, thus solving many of the present problems of judicial administration.

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[69] *Mississippi Supreme Court Rules,* 161 Miss. 903 at 905. Rule No. 11.

[70] "Annual Address of the President, Mississippi State Bar Association," *Reports of Mississippi State Bar Association,* VIII, 41-75 at 46-47 (1913).

[71] 104 Miss. 871 (1913).

It is believed that one of the most potent steps toward promoting efficiency, economy and a greater degree of justice in the entire state judicial system would be a liberal application of a rule similar to the one discussed in the last paragraph. To prevent charges of usurpation of powers, judicial law-making, and the like, it would perhaps be better to grant such authority to the Court by statute; or, to prevent any question arising as to the power of the Court to encroach upon the constitutional right of jury trial, it might be advisable to amend the Constitution in such a way as to leave no doubt as to the Court's power to make and enforce such a rule.

Arguments will probably be made that such a practice by the Supreme Court would result in a judicial tyranny. An answer to this is that the practice in England has not resulted in such tyranny. The power of the Court to set aside a civil judgment where it is contrary to the weight of evidence, or to affirm a civil judgment even if the jury was influenced in its verdict by passion, has not resulted in judicial tyranny in civil cases in the state. With our present powerful industrial corporations there may be just as great inequality between parties to a civil suit as between the state and a person charged with crime.

To a person who has had his property stolen, burned, or fraudulently taken from him by criminals; or has lost friends or relatives, or perhaps has himself been maimed by ruthless "thugs" or "gangsters," the thought of judicial tyranny might not be any more repulsive than the actual criminal tyranny to which this great land of ours is, at least in a degree, subjected at present. As the great Justice Holmes once said, "At the present time in this country there is more danger that criminals will escape justice than that they will be subjected to tyranny."[72]

It is said that we must use modern methods of criminal detection and prosecution. Such methods will avail us little if our Supreme Court continues to measure twentieth century judicial activities by eighteenth century (or earlier) rules.

IV

Auxiliary Judicial Agencies

The Grand Jury. The grand jury, though discussed in another connection as an adjunct of the circuit court, is in many respects an independent body. To say the least, it is a very important part of the machinery for criminal law administration in the state. The Constitution stipulates that the Legislature shall provide by law for the procuring of a list of qualified persons, and for the drawing therefrom of

[72] *Kepner* v. *United States,* 195 U. S. 100 at 134 (1904).

grand and petit jurors for each term of circuit court.[73] Under the present statutory provisions every male citizen not under the age of twenty-one years, who is a qualified elector and able to read and write, has not been convicted of an infamous crime or the unlawful sale of intoxicating liquor within a period of five years preceding, and who is not a common gambler or habitual drunkard, is a competent juror. Certain persons are exempt from jury service, including physicians, osteopaths, dentists, teachers and officers of public schools, locomotive engineers, keepers of public mills and ferries actually pursuing their work, paying tellers of banks, telegraph operators, ministers of the gospel and Jewish rabbis, practicing attorneys, at least on apothecary in each drug store, persons above the age of sixty years, and persons who have served on a grand jury within the two years preceding.[74]

The method of selection can hardly be calculated to secure a well qualified group of jurors. Each year the members of the county board of supervisors each selects a list of "qualified persons of good intelligence, sound judgment and fair character" from their respective districts, in proportion to the total number of qualified electors in the district. The total for the five lists must ordinarily be not less than 200 nor more than 800. These lists are certified by the clerk of the board to the clerk of the circuit court and kept by the latter in five sealed compartments—one for each list. At each term of circuit court the judge draws fifty names for the first week's jury service and thirty for each additional week contemplated, for the *next* term of court. In due time these names are taken by the clerk and the persons summoned to appear in court. From the list of fifty names for the first week, not less than fifteen nor more than twenty are drawn by the judge in open court to serve as grand jurors—the others serve as petit jurors.[75]

The circuit court judge charges the grand jury when it is impaneled but it works more or less independently of the judge.[76] Likewise, the grand jury is independent of the county and district attorneys, at least in theory. It is well known that ordinarily a grand jury is subservient to the wishes of the district attorney; but on occasion a grand jury acts independently of, and contrary to the wishes of, a

[73] *Constitution of Mississippi,* 1890, § 264.
[74] *Mississippi Code,* 1930, §§ 2029-32.
[75] *Ibid.,* §§ 2033-46.
[76] Upon one occasion a judge refused to dismiss a grand jury, when it reported that it had finished its work, but on the contrary lectured to it on its failure to indict anybody for a certain kind of crime then allegedly being committed in the county, after which the grand jury went back and returned an indictment for the crime mentioned. The Supreme Court held that the indictment was illegal and should have been quashed. *Blau* v. *State,* 82 Miss. 514 (1903).

district attorney.[77] The grand jury is supposed to seek the advice of the district or county attorney, but it is fatal to an indictment if it is shown that such officer unduly influences the grand jury in bringing an indictment.[78]

In theory, it might seem that the grand jury would be an ideal body by which crimes would be investigated and indictments fearlessly returned. In practice, however, such is not the case. Investigation of many grand jury reports in various counties, and conversations with dozens of men who have served on grand juries furnish convincing proof that, as a rule, the grand jury is a colorless body usually ready to act as a rubber stamp for the prosecutor. Some excerpts from typical grand jury reports may be of interest. In July, 1929, the grand jury in Forrest county reported, in part, as follows:

> "We are sorry to report that we find so much lawlessness in this county . . . we find that stealing, burglarizing, robbery and murder is rampant in this great county and in the name of God we humbly beg that the good people put their shoulders to the wheel and as one say that this condition shall cease."[79]

But even with the deplorable crime conditions in the county the group wished "to commend the sheriff and his forces for the efficient work they are carrying on." With an efficient "sheriff and his forces" one wonders wherein the cause for the deplorable crime conditions lay.

In the same county a year before a grand jury had reported:

> "We found all of the buildings which are required by law to be equipped with fire escapes, to be properly equipped, with one exception, and that is the three story building known as the Hattiesburg American building, and the fire escape to there is a grave source of danger to the public, as it is liable to fall in the alley most any time. We understand that three or four grand juries have complained of the fire escape, and we have not indicted but we recommend to the next grand jury to indict the party responsible for this condition, unless the same is repaired."[80]

If the fire escape on the building was a "grave source of danger," one may ask why four or five grand juries would do no more about it than to mention it and recommend action rather than take some specific action. This illustrates the spineless character of the average grand juries. One may well wonder how many warnings should be given a person who is maintaining a public nuisance. To delve

[77] See R. N. Miller, "Needed Reforms in the Criminal Law and Procedure in the State," *Reports of Mississippi State Bar Association,* IV, 89-104, at 94 (1909).
[78] G. H. Ethridge, *Mississippi Constitutions,* 146.
[79] *Minutes, Circuit Court,* Forrest County (Miss.) Book 10, pp. 2-3 (1929).
[80] *Ibid.,* Book 9, p. 491 (1928).

into speculation, suppose the "grave source of danger" had fallen and snuffed out the lives of a half-dozen persons, upon whom could the "official" responsibility have been placed? Legally, it could have been placed at the hands of any one of a half-dozen grand juries, each of which came into being, not by appointment but by a process of drawing names, functioned for a few days, made its report, and passed on. Regardless of what actual influence a prosecutor may have over the grand jury, he is legally no part of such jury, and cannot be held responsible in any sense of the word for what the grand jury does or fails to do.[81] Thus it is that no elective official can be held responsible in a very important phase of the work of our elective judicial system.

A classic example of the exhortations often found in grand jury reports is the following made in a county where the "noble experiment" was evidently proving an ignoble failure:

> "If the citizenship of the county would rise in their might and power and go after the distilled retailed and bootlegged liquor and stop the traffic in whiskey our county would grow and flourish like a green bay tree by the river of water, our criminal courts would be a thing of the past, and our lives and property would be protected and our churches, schools, and colleges would flourish, we urge every good citizen and every good woman to join hands and organize this illegal business out of business in our county."[82]

In several respects the grand jury system as it is found in Mississippi at the present time is unsatisfactory. As an auditorial group to examine the papers, records, books and accounts of public officers, about the only thing that prevents it from appearing absolutely ridiculous is the fact that the members themselves usually admit that they are incapable of properly examining such reports. Reports on accounts are usually conditioned by some such statement as "correct so far as we are able to ascertain," or "not being expert accountants we are not able to detect any irregularities." As for books and records, other than accounts, the grand jury functions very ineffectively.[83]

With its main function, that of investigating crime and returning indictments against alleged law violators, the present grand jury system is under strong condemnation both in and out of the state. In Mississippi, all criminal prosecutions (at least, against private persons) originating in the circuit court are required to be by indictment. The

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[81] Ethridge, *op. cit.*, 146.

[82] *Minutes, Circuit Court,* Covington County (Miss.), Book 4 (January, 1922, term of court).

[83] For a more detailed discussion, see 6 Mississippi Law Journal, 115 ff. (December, 1933).

grand jury is no longer primarily an inquisitorial body, but has become almost wholly an accusatorial agency. It no longer depends upon its own knowledge of crime conditions and it exercises very little initiative in investigations, as a rule. The district attorney is depended on, consciously or unconsciously, to present cases to the grand jury, to call witnesses and examine them, and, of course, to draw up indictments. It is doubtful whether results in ordinary indictments would be very different if they were left entirely in the hands of the prosecutor.

In summarizing the present status of the grand jury as an accusatorial body Professor Willoughby points out the following reasons for its inadequacy in this capacity:

> "First, and in some respects most important of all, the grand jury no longer conforms to the modern theory of the location of responsibility for the detection and prosecution of crime. This responsibility, instead of being vested in the community, now attaches directly to the state. Furthermore, the state as a logical consequence of the possession of this new responsibility, has developed, in its official police force and public prosecutor, agencies for discharging its responsibility that were not in existence at the time that the grand jury took its rise. Both the initiation of criminal proceedings and the most effective means of determining probable guilt have, as a matter of fact, passed out of the hands of the grand jury into those of other agencies, the police and public prosecutor, and the former has been relegated to a secondary position as a mere agency for registering decisions otherwise reached.
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> "Secondly, as a necessary consequence of this changed condition of affairs, the grand jury has become a body that no longer serves any useful purpose, but is a positive drag upon the administration of criminal justice. It divides responsibility, complicates by just so much the machinery and procedure of criminal administration, adds to the burden of the public prosecutor, entails delay, increases expense, and is productive of hardship to witnesses and those called upon to serve as jurors.
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> "Finally, not only does the grand jury no longer meet a need as a device for protecting the individual against official oppression, since that need has passed away with the abolition of autocracy, the establishment of an independent judiciary, and the development, through constitutional guarantees and otherwise, of other more effective means of protection, but, due largely to the *ex-parte* and secret character of its proceedings, too often is responsible for sending to trial persons who, under a proper system of careful preliminary examination, could establish their innocence of the charges preferred against them."[84]

In at least nineteen states of the Union prosecutions in all criminal cases can be initiated by an information by the prosecutor or upon a

[84] W. F. Willoughby, *Principles of Judicial Administration,* 190-91.

presentment by an examining magistrate, and in seven other states the same procedure is allowed in all except the most serious offenses.[85] In 1912 a committee of the Bar Association in Mississippi made the following recommendation with reference to the grand jury:

> "The constitution should be so changed as to authorize district attorneys and other official prosecutors to institute criminal proceedings in all cases by information on their own relation and responsibility."[86]

This seems to be as far as the movement to supplant the grand jury in most criminal prosecutions has advanced in the state.

A potent argument for relieving the grand jury of a great deal of its duties as an accusatorial body is that it will permit it to give more time to those kinds of functions for which it is most naturally fitted, namely, those of an inquisitorial nature. The *Report of the Cleveland Survey of Criminal Justice* contained the following observation on the proper function of a grand jury:

> ". . . There will always be instances in which the inquisitorial powers of the grand jury are necessary for the initial discovery or proof of a violation of the law, and in which, just as at present, the prosecution will be begun by a grand jury. At times it is needed to institute inquiry into the acts of public officials themselves, being presumably more independent of the accused officials than other organs of the administration of justice. For these situations the grand jury, both regular and special, continues to have a special and valuable function for which it should be maintained . . ."[87]

It has been well said in this connection that:

> "The critics of grand jury procedure never propose to abolish the institution. They want to preserve it for the use to which it may occasionally be put by getting it out of the way of the course of prosecutions in ordinary felonies, which constitute 99 percent of all. This is readily done by permitting the judge (or a bench) to call a grand jury when occasion requires, or to provide for juries once a year on the assumption that an inquisition will do the public some good."[88]

In view of the apparent satisfactory results obtained in other states through the substitution of informations and presentments for grand jury indictments in ordinary criminal cases, and in view of the wide condemnation of the grand jury as the sole accusatorial agency in

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[85] "Light on Grand Jury Procedure," (editorial), *Journal of the American Judicature Society,* XV, 120-22 (1931).

[86] "Report of the Committee on Jurisprudence and Law Reform," *Reports of Mississippi State Bar Association,* VII, 14-18 at 15 (1912).

[87] *Criminal Justice in Cleveland,* 211-12 (Cleveland, 1922).

[88] "Light on Grand Jury Procedure," *loc. cit.,* 121.

felony cases in a court system, it seems that Mississippi might, for the sake of efficiency and economy in the administration of criminal justice, follow the recommendation of the Bar Association committee, quoted above, and permit the use of the information by prosecuting officers in the circuit court.

Another reform which is sorely needed in Mississippi arises in connection with the selection and exemption of jurors. The making up of the jury lists by the boards of supervisors is a form of political patronage. As a general rule the best qualified men in a county do not want to serve on juries and do not hesitate to use their influence to keep their names off the jury lists. But many men, not so well qualified, actually seek the "office" of juror and candidates for the office of supervisor often pledge themselves, if elected, to place the names of some of these more or less undesirable persons upon the jury lists.[89]

The provisions with reference to exemptions from jury service, given above, virtually guarantees juries, both grand and petit, of second rate calibre. With reference to the subject of exemptions from jury service, a committee of the State Bar Association stated in 1911:

> "We believe the method of selecting juries, and the material from which the juries come, is the most glaringly needed reform. The statutes exempt from jury service over one-half of the entire eligible jury lists of the counties, for one reason or another, and this is the very best half of the community . . . It happens, as a rule, in our observation, that the very poorest and least qualified material for the all-important service is selected."[90]

But in spite of the glaring imperfections of the system as pointed out by the committee, no substantial reforms have been made in the jury system in almost a quarter of a century since the above indictment was made. It is significant, too, that reforms in connection with the selection and exemption of jurors could be brought about through statutory enactment.

The committee, last quoted, was of the opinion that "the importance of reforms along this line [selection for and exemption from jury service] in reference to juries we think should be our first concern." It suggested the following alternative plans as possible methods of reform:

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[89] Governor E. F. Noel in a special message to the Legislature in 1910 said: "Good men usually seek to keep off of, and evil men get on, grand and petit juries . . . Supervisors, with political aspirations and desire to please, sometimes select jury lists on this basis." *General Laws of Mississippi,* Special Session, 1910, 327-46 at 340.

[90] "Report of Committee to Recommend Changes in Criminal Law and the Jury System," *Reports of Mississippi State Bar Association,* VI, 16-22 at 16 (1911).

"1. To provide for a jury commission to be composed of the circuit judge, the sheriff of a county, and the chancellor, and let the commission be compelled to select jurors for the box to serve for one year.

"2. To have a jury commission of three selected by the chancellor, who is practically disinterested in trials by jury, in each county from its best citizens, who shall before each term of court be required to fill the jury box with a sufficient number of the best citizens of the county eligible to jury service.

"3. If the commission in either form cannot be agreed upon, then the committee suggests that all exemptions from jury service be repealed and that the name of every qualified voter be placed in the jury box, and from the whole mass juries for each term of court be drawn."[91]

All of the above discussion with reference to the selection and exemption of jurors applies to both grand and petit jurors, perhaps more forcefully to the latter. The selection of the grand juries is of considerable importance, but it appears to the writer that the most crying need for reform in connection with grand juries has to do with the functional aspects of these bodies. The writer submits that the following changes should be made with reference to the functioning of grand juries and the selection and exemption from service of both grand and petit jurors: First, grand juries should be allowed, as at present, to return indictments in all criminal matters but the district attorney should be empowered to initiate prosecutions by informations; second, grand juries should be impaneled only at the instance of the circuit court judge or upon petition of one hundred voters in any county; third, the state auditorial department should be increased in personnel and required to audit all public accounts in the counties, including justice-of-the-peace dockets, at least once each year; fourth, the county boards of supervisors should be charged with examining and reporting on the condition of public property of the county as now required of the grand juries; fifth, jurors should be selected according to the third plan submitted by the above quoted committee, with certain necessary changes.[92] It has been the writer's observation over a period of years that the grand juries have really uncovered few "public scandals" or other criminal acts of a general public nature. Most of such discoveries are made by boards of supervisors, legislative investigating committees, "snipers" from the attorney general's office,

[91] *Ibid.*, 16-17.

[92] The "voting list" plan of selection of juries has worked well in other jurisdictions, particularly in Cleveland, Ohio. See an editorial "Jury Service Elevated in Cleveland," in *Journal of the American Judicature Society,* XV, 8-10 (1931). In Mississippi it would, under the present plan of having only male jurors, necessarily have to be restricted to the male members of the qualified voters' list.

local bar associations and the like. It is true that after an irregularity is discovered the grand jury is the logical agency to investigate it, but in such a case it is reasonable to suppose that a circuit court judge would impanel a grand jury. The routine work would be done by the district attorney.[93]

The Coroner. The office of coroner is an old one. Professor Willoughby says it has certainly had a continuous existence since the twelfth century and that there is evidence that its origin dates farther back than that.[94] The Constitution of 1832 in Mississippi provided for the election of a coroner in each county.[95] The office has remained as a constitutional office since that time, though the present Constitution leaves the manner of selection at the discretion of the Legislature.[96] The office is in fact filled, if at all, by popular election.[97]

The principal duties of the coroner as prescribed by law are: first, to investigate violent, sudden, unusual or casual deaths and to impanel coroners' juries and hold inquests in such cases; second, to act as sheriff when such officer is incapacitated and there is no deputy to act in his place; and third, to act as keeper of the county jail in case the sheriff is a prisoner therein.[98]

Vacancies in the office of coroner may be filled temporarily by the circuit court judge of the district in which the vacancy exists.[99] Where no coroner is available a justice of the peace may serve in the capacity of coroner if there is a death to be investigated.[100]

Although the office of coroner exists as a constitutional office in the state, the report of the secretary of state shows that at the present time there are only thirty-four coroners in as many of the eighty-two counties of the state.[101] The reason for this is simply that no one offers for the office in many counties.

One of the qualifications ordinarily stressed as a requisite for one holding the office of coroner is that he should be a medical expert.[102] It is interesting to note that of the 34 coroners listed in the state, only one is listed as a medical doctor. The investigator for the Brookings Institution found that during the biennial period 1927-29 the follow-

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[93] Since a large part of this last section applies to the petit jury as well as the grand jury, it is not deemed necessary to give a separate section to a discussion of the petit jury.

[94] Willoughby, *op. cit.*, 163.

[95] *Constitution of Mississippi,* 1832, Art. V, § 19.

[96] *Ibid.,* 1869, Art. V, § 22; *Ibid.,* 1890, Art. V, §§ 135, 138.

[97] *Mississippi Code,* 1930, § 6210.

[98] *Ibid.,* §§ 639, 651, 654.

[99] *Ibid.,* § 748.

[100] *Ibid.,* § 649.

[101] *Biennial Report of the Secretary of State* (Miss.), 1929-31, opposite p. 56.

[102] Willoughby, *op. cit.*, 165.

ing occupations were reported by the coroners of the state: former business man, editor, undertaker, bricklayer, carpenter, barber, and peanut and popcorn vendor.[103]

Needless to say, the office of coroner in the counties of Mississippi is considered of little importance. Perhaps the chief reason for its continued existence is that it cannot be abolished without amending the Constitution, and little harm apparently comes from its existence.

It seems to be the general opinion among students of judicial administration that the office of coroner should be abolished and some other arrangement made for performing the work required of holders of this office. Authorities are agreed also that two essential qualifications of one performing the duties of coroner in connection with investigations of unusual or violent deaths are a knowledge of medicine and of criminal law.[104]

Such a combination as that mentioned in the last sentence will rarely be found in one person in Mississippi. It seems therefore, that it would be better to transfer the duties of the coroner, in connection with such investigations, to the district attorney and authorize him to employ such experts as he deems necessary in any case.

The County Prosecuting Attorney. In 1910 the officer of county prosecuting attorney was created.[105] Its establishment is optional with the electorate of any county. Upon petition of twenty percent of the qualified electors of the county the board of supervisors must order an election to determine whether such office shall be established —or abolished after being once established—for that county. In a county where the office has been established and later abolished the board of supervisors may re-establish it, unless twenty percent of the qualified electors petition against such re-establishment. In the latter case the board may call an election to see if a majority of the electors will support its efforts.[106]

County attorneys are found in fifty-five of the eighty-two counties of the state.[107] These officers are elected by the voters of the respective counties at the same time other regular county officers are chosen and for a term of four years.[108] The salary of the county attorney is fixed

[103] *Report on a Survey of the Organization and Administration of State and County Government in Mississippi,* 813.

[104] Willoughby, *op. cit.,* 165 ff.; W. F. Dodd, *State Government,* 288 ff.

[105] *General Laws of Mississippi,* 1910, 96-97. Though the official title of this office is "county prosecuting attorney," we will refer to it hereafter as "county attorney."

[106] *Mississippi Code,* 1930, §§ 4221-22.

[107] See *supra* note 101. The table here referred to lists fifty-eight county attorneys but in three counties it will be noted that the district attorney has been listed as county attorney.

[108] *Mississippi Code,* 1930, § 6210.

by the board of supervisors within certain legal minima and maxima based on assessed valuation of property in the counties.[109] It appears that in many counties less than the legal minima is paid while in a few counties the attorneys receive more than the maxima set by law.[110]

The county attorney is required to act as prosecutor before the justice of the peace and county courts, and to assist the district attorney in all criminal cases in the circuit court of the county. He also assists in civil cases wherein the state, his own county, or a municipality within the county is interested; represents the state before the grand jury of his county; and passes upon accounts against the county before they are allowed by the circuit court. Other duties of the county attorney are to represent the state plant board when requested, and to serve on the county board of inquiry.[111] It is also provided that he may act as attorney for the board of supervisors,[112] but it does not appear that he serves in this capacity as a rule.[113] The county attorney cannot be required, under the present legal provisions, to give advice to the other officers of the county or local subdivisions. However, in some counties he does give legal advice to other officers, including the board of supervisors, either with or without additional compensation.[114]

At present the office of county attorney may be justifiable in many counties of the state, but the actual practice among the holders of this office in various counties does not seem to justify their retention of this officer. The county attorneys do not attend the justice of the peace courts regularly. Occasionally, when a justice of the peace has a case docketed which he considers of extraordinary importance he may get in touch with the county attorney and ask him to attend the court and prosecute the case, or the sheriff or a constable will sometimes ask the county attorney to assist in prosecuting certain misdemeanants, especially the more obnoxious ones. To say the least, the county attorney's practice before the justices of the peace is more or less sporadic and unplanned. A close co-operation between the county attorney on the one hand and the justices of the peace and other law enforcement

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[109] *General Laws of Mississippi,* 1932, 488. The range is from $600 to $2,000 a year. In counties with county courts boards of supervisors may pay the county attorney from $300 to $500 a year additional.

[110] This results from the fact that in some counties they are paid for acting as attorney for the board of supervisors and the like.

[111] *Mississippi Code,* 1930, §§ 4225-26, 6972, 5812.

[112] *Ibid.,* § 4228.

[113] *Report on a Survey of the Organization and Administration of State and County Government in Mississippi,* 823.

[114] *Ibid.,* 824.

officers of the county would probably result in a much more efficient administration of the criminal laws in the county. Many cases are lost by the state in the circuit or Supreme Court as a result of some legal mistake made by the justice of the peace or arresting officer in the preliminary stages of the cases. The laws make no direct provision for the use of the county attorney by the officers charged with the enforcement of the criminal law in their work of investigating crimes and preparing cases for trial. There is a legal side to every step in bringing a criminal to justice. The law officer of the county, however, ordinarily participates in this process, if at all, only in the actual trial of the person at the bar.[115]

The various grand jury reports studied indicate that the county attorney assists the grand jury a great deal in its deliberations. In one other connection he performs valuable service. That is in assisting the district attorney with cases in the circuit court. Efficient county attorneys can and do perform a much needed service in many counties by preparing cases for trial.

The writer believes, however, that the office of county attorney should be abolished. In counties where the legal business of the state and county, respectively, justifies it, there could be an assistant district attorney to act in the same capacity as the county attorney acts now.

The District Attorney. The office of district attorney is provided for in the Constitution in these words:

> "A district attorney shall be selected in the manner provided by law, whose term of office shall be for four years, whose duties shall be prescribed by law, and whose compensation shall be a fixed salary."[116]

At present district attorneys are selected by popular vote in the respective circuit court districts at the same time the regular state and county officers are elected.[117] District attorneys are not allowed to engage in criminal practice, except in their official capacities as prosecutors, though they may continue their civil practice.[118] They receive an annual salary of $3,000 each.[119]

The principal duties prescribed by law for the district attorney are

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[115] This differs from the practice in England where laws are apparently much better enforced than they are in this country. There, law enforcement officers have their legal advisers to assist in investigating a case and preparing it for trial, though they often are not represented by an attorney at the actual trial of the case. The English emphasize the use of the attorney in preparing a case for trial; we emphasize the use of the attorney to represent the state at the bar. See Pendleton Howard, *Criminal Justice in England,* 158.

[116] *Constitution of Mississippi,* 1890, § 174.

[117] *Mississippi Code,* 1930, § 6210.

[118] *Ibid.,* § 1067. Except as to certain cases involving public utilities.

[119] *General Laws of Mississippi,* 1932, 392.

as follows: First, he represents the state in all criminal cases in the circuit court of his district and all civil cases in which the state may be interested; second, he represents any county of his district interested in a civil case in the circuit court, unless two or more counties are adversely interested; third, he may institute and prosecute to final judgment or decree any case in the name of the state against any person or corporation for a violation of the constitution or the laws of the state, in order to enforce any penalties, fines, or forfeitures imposed by law in any court of his district; fourth, he assists the grand jury in its investigations and advises it on points of law, when requested; fifth, he passes on accounts to be approved by the circuit court; sixth, he gives written opinions on questions concerning revenue or county expenses, and with the consent of the attorney-general he may institute prosecutions against anyone indebted to the county or state in his district; seventh, it is his duty to see that the fines and penalties imposed by the circuit court of his district are enforced; and finally, with the consent of the attorney general, he may institute prosecutions for violations, in his district, of the anti-trust laws of the state.[120]

The remarks made above with reference to the lack of preparation of cases by the county attorney apply with equal force to the district attorney. Fully twenty per cent of the criminal cases reversed by the Supreme Court during the three years 1926-28 were reversed for reasons which indicate that the district attorneys were careless in the preparation and prosecution of the cases. One notes the following reasons for reversals: "No transcript or certificate sent up by the justice of the peace"; "indictment improperly drawn"; "jurisdiction not proved"; and "improper remarks by the district attorney."[121]

The examples previously given in connection with the disposition of cases by the circuit court indicate the important part played by the district attorney in disposing of cases by methods other than by actual trials, and also the influence he has over the progress of the court in trying criminal cases.[122] There is no doubt but that many cases in which the district attorney recommends *nolles,* dismissals, or the like, such action is to the best interest of the people in saving expensive trials where convictions would be out of the question. But on the other hand, in view of the influence which the district attorney has over the grand jury in returning indictments, it may be questionable whether there is justification for such a large percentage of cases being

[120] *Mississippi Code,* 1930, §§ 4363-66, 4368, 4370.
[121] See *supra,* part III.
[122] See 6 Mississippi Law Journal, 243 ff.

disposed of through these methods. A more zealous preparation of the cases by the prosecutor would perhaps change these results.[123]

It has been noted that the district attorney is permitted to engage in civil practice during his incumbency in office. In view of the fact that this officer is supposed to direct the investigation of criminal cases and to prepare them for trial, as well as to act as the barrister for the state, it is believed more efficient work would be secured from this officer if he were not allowed to engage in private practice and were paid a salary sufficient to justify the best attorneys seeking the office. Providing a reasonably high salary for the district attorney, as just proposed, and making him appointive by the attorney general, as will be proposed in the next section, would probably increase the efficiency of this very important office.

The Attorney General. The Constitution provides:

> "There shall be an attorney general elected at the same time and in the same manner as the governor is elected, whose term of office shall be four years and whose compensation shall be fixed by law. The qualifications for the attorney general shall be the same as herein prescribed for judges of the circuit and chancery courts."[124]

The attorney general appoints three assistant attorneys general, with the approval of the chief justice of the Supreme Court, and two special agents.[125] These with four stenographers and the general himself comprise what is sometimes referred to as the state's department of justice. The salary of the attorney general is $6,750 at the present time, having been reduced from $7,500 in 1932.[126]

The duties of the attorney general are of four principal kinds, namely, forensic, investigative, advisory and administrative. He is required to appear before the Supreme Court and prosecute, or defend as the case may be, "all cases to which the state or any officer thereof in his official capacity, is a party, and all cases to which a county

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[123] Upon one occasion in 1932 when the writer was in the office of a circuit court clerk in a county where the circuit court was then in session, the district attorney came into the office late in the afternoon to "check up" on cases set for the next day. His first discovery was that the principal state witness in the case set for eight-thirty o'clock the next morning had not been subpoenaed and that he lived about 100 miles from the place where court was being held. After a "lengthy" deliberation of about thirty seconds, he decided that the case would have to be passed and set for a later date. Upon another occasion the prosecutor called for a particular case to be tried next, only to be informed by the judge that the case had been disposed of at the previous term of court.

[124] *Constitution of Mississippi,* 1890, § 173.

[125] *Mississippi Code,* 1930, §§ 3656-59.

[126] *General Laws of Mississippi,* 1932, 392. Before the reduction in 1932, the attorney general received the same amount as salary as did the governor and the several members of the Supreme Court.

may be a party, unless the interest of the county be adverse to the state or some officer thereof acting in his official capacity, or to some other county"; he prosecutes suits at the request of the governor or other state officer; he represents the state or state officers in suits against the state or state officers "in their official capacity touching upon any official trust or duty, and triable at the seat of government"; he is the attorney for the state tax commission; represents the state in anti-trust suits; and "when required by the public service, or when directed by the governor" he must assist district attorneys in the discharge of their duties and in any prosecution against a state officer. It is the attorney general's duty "when required by the governor" to investigate alleged cases of malfeasance or nonfeasance in office by state officers and to institute suits on their official bonds; and to bring suits for the collection of back taxes or other moneys owed to the state or any sub-division thereof. He is required to render opinions in writing to state and county officers upon any legal question when requested. Duties of a more or less administrative character consist of the following: Approving accounts against the state subject to allowance by the Supreme Court; granting charters of incorporation; drawing up contracts, forms, and other documents; assisting the land commissioner in disposing of public lands; and serving *ex officio* as a member of various state boards and commissions.[127]

The biennial reports of the attorney general give some idea of the work he does in connection with the administration of justice. During the two year period from July 1, 1929 to June 30, 1931, the attorney general's office handled 498 criminal cases before the Supreme Court.[128] This seems to be about the average for each biennial period. 159, or about thirty-one per cent of the cases were not prosecuted by the appellants. During the same period about 200 inquiries of a legal nature were addressed to the attorney general's office by state and local officers and opinions were rendered in all of them.[129] The attorney general stated that this was an unusually large number of such inquiries, the increase being due to the adoption of the new code in 1930. The average, according to his statement, is about sixty each year.

The number of civil cases in which the attorney general's office assisted is not given in the report. Mention is made of eight important civil cases in this category, of which six were appealed to the United

[127] *Mississippi Code*, §§ 3661-79.
[128] *Biennial Report of the Attorney General* (Miss.), 1929-31, appendix, 7.
[129] *Ibid.*, 5.

States Supreme Court.[130] Neither does the report mention any cases in which the office assisted in the trial courts.

In spite of the great variety of functions performed by the attorney general and his force, it is readily perceived that his is not a powerful office. Most of his duties in connection with the administration of justice are of a follow-up nature and not of his own initiation. In a few kinds of cases he is authorized to institute suits, as has been noted, and in a few others he may institute proceedings at the request of the governor or some other officer, but otherwise he enters only to assist in defending or prosecuting suits already instituted in trial courts, or appealed in due course, to the Supreme Court. He is in no sense the head of a state department of justice with power to direct the work of local prosecuting or law enforcement officers. Such officers exist independently of the attorney general and there is no organic connection between him and them respectively.

A statement by the National Commission on Law Observance and Enforcement (the Wickersham Commission) is descriptive of the relation of the attorney general to the local enforcement officers and prosecutors in Mississippi. The statement follows:

> "Although the organization of public prosecution varies greatly from state to state, the general features are fairly uniform and certain characteristics are all but universal. Nowhere is prosecution as well organized as in the Federal Government, and by and large the State systems are much less efficient and much less satisfactory.
>
> "There is an attorney general in each state. But usually he is like the Attorney General of the United States under the act of 1789. There is seldom any effective central superintendence and control of prosecutions. There are no State departments of justice such as has grown up under the Federal Government. In a few States the attorney general has some control over local prosecutions. But the prevailing policy makes the local prosecutor the attorney general in his locality . . . .
>
> "These prosecuting attorneys . . . are as a rule independent and responsible only to the local electorate."[131]

The Brookings Institution in its study of the state and county governments in Mississippi recommended that the attorney general be made appointive by the governor, and that he in turn be given the power to appoint and remove district and county attorneys, with adequate powers to supervise and direct the work of these officials.[132] Such a change in the manner of choosing the attorney general would require a change in the constitution.

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[130] *Supra,* note 128.
[131] *Report on Prosecution,* 9-11.
[132] *Report on a Survey, etc., in Mississippi,* 471-72.

In general, the writer indorses the recommendations of the Institution. However, if the number of circuit court districts were increased, as proposed in a former number in this series, and the number of district attorneys correspondingly increased, it is believed the office of county attorney should be abolished. If there is need for them, assistant district attorneys can be assigned to particular districts or counties. This writer does not propose that the changes relative to the district and county attorneys should be contingent upon the making of the attorney general appointive. He believes, on the other hand, that a very efficient department of justice can be built up with an elective attorney general at its head.

V. Conclusion

At various points in this series of articles the writer has hazarded proposals for improving the administration of justice in the state. Space does not permit a summarizing of these proposals at this point. However, in the organization and administration of the judicial system it is believed at least two important innovations (so far as Mississippi is concerned) should be made. These are (1) the establishment of a judicial council, and (2) the provision for machinery for the collection of complete judicial statistics. These will be briefly considered at this point.

Athough little more than two decades have passed since the judicial council movement got under way in the United States, the council may be considered already a fixed institution of government.[133] Nevertheless, many students of the subject believe that the judicial council has not been given affirmative powers sufficient to enable it to render the maximum of service in improving the administration of justice.[134] We may expect, therefore, that the institution will become of increasing importance in the future.

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[133] The first semblance of a judicial council in the United States was the Wisconsin Board of Circuit Judges created in 1913, though the movement is often considered to have begun with the establishment of the Judicial Council of Ohio in 1922. See Willoughby, *op. cit.*, 264-69.

[134] Professor Willoughby thinks that "though these bodies have not been given the affirmative powers that students of judicial reform believe should be conferred upon them, their creation represents a great advance." *Op. cit.*, 280.

In a report of the subcommittee on law reform of the executive committee of the Chamber of Commerce of the State of New York and of the Association of the Bar of the City of New York, recommending a strong judicial council for the state, it was stated: ". . . We suggest that the experiences of those councils already functioning demonstrate that their utility is seriously limited by the very lack of the new powers which we have suggested, and that it is clearly demonstrable that there can be no effective re-organization of our administrative judicial system until we have an executive head with adequate powers and facilities." "Proposal to Give New York Judicature Strong Judicial Council," *Journal of the American Judicature Society,* XVI, 9-11 at 11 (1932).

At the present time nineteen states and the nation at large have judicial councils.[135] The councils vary especially in the manner of their creation, in their composition, and in their powers. Most of them have been created through statutory enactments but the California Judicial Council was created by means of a constitutional amendment,[136] and the council in the state of Utah is simply a standing committee of the state bar association.[137] Some judicial councils are composed entirely of judges, usually from the supreme (or highest) court and one or more trial courts,[138] but more commonly practicing members of the bar are given seats, along with the judges,[139] while some states place legislators, the attorney general, law professors, or even laymen on their councils in addition to the judges and practicing attorneys.[140]

It is a common practice for the members of a judicial council, other than the ex-officio members, to be appointed for short terms by the governor.[141] It is also a general rule for the chief justice of the highest appellate court to serve as chairman of the judicial council in his jurisdiction. The United States Council of Senior Circuit Judges with the Chief Justice of the Supreme Court (which in fact is the national judicial council) has authority to transfer district judges from one district to another in order to "clear up" congested dockets, and the California Judicial Council has certain rule making powers (for court procedure); but on the whole such powers have not been vested

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[135] Perhaps the best single study of the judicial council movement is a book, *The Judicial Council,* prepared by the committee on judicial administration of the Merchant's Association of New York and published in 1932.

The *Journal of the American Juricature Society* (Ann Arbor, Michigan) gives up to date information on the subject.

[136] *Statutes of California,* 1925, 1369-70.

[137] *Journal of the American Judicature Society,* XV, 106 (1931).

[138] The national judicial council consists of the Chief Justice of the United States Supreme Court and the senior circuit judges of the ten circuit courts. The California Judicial Council is composed of the chief justice and an associate justice of the Supreme Court of the state, three justices of the courts of appeal, four judges of the superior courts, one judge of a police or municipal court, and one judge of an inferior court. The chief justice assigns (appoints) the other members of the council.

[139] In Massachusetts, for example, the council consists of a justice (or former justice) of each of five courts, together with four members of the bar. In Connecticut a state's attorney is a member of the council along with judges and private practitioners.

[140] In the states of Washington and Kansas the chairmen of the house and senate judiciary committees are members of the judicial councils respectively. The council in North Carolina is composed of the attorney general, chairmen of the two legislative judiciary committees, two supreme or superior court judges, two law practitioners, a professor from each of three law schools in the state and two laymen.

[141] Exceptions to this rule are found, for example, in Kansas and Virginia where the presiding judges of the Supreme Courts respectively appoint the "attorney members" as well as designate the "judge members."

in judicial councils. In a few jurisdictions, notably California, Massachusetts and the United States, the assembling of judicial statistics has been linked up with the other functions of judicial councils.[142] But generally, it may be said, judicial councils exist to carry on continuous investigations of the judicial systems in their respective jurisdictions, to make recommendations to the governor and legislature concerning statutory changes, and to make suggestions to the courts respecting changes in practice and procedure.

From the above statements it can be seen that the judicial council functions, primarily as a fact-finding and advisory body. It functions in fact, as a continuing survey of the judicial system. The accomplishments of the existing judicial councils are convincing evidence of the value of such bodies.[143] The Institute for Government Research in its study of state and county government in Mississippi made this statement:

> "There is an almost unanimous opinion on the part of students of judicial administration that these bodies [judicial councils] have been of great value in promoting reform in the field of judicial administration and can be made to render still more valuable services. It is accordingly recommended that serious consideration be given to the desirability of creating a similar council in Mississippi."[144]

Serious consideration has been given, at least by the bar of Mississippi to the desirability of creating a judicial council for the state. In fact a committee of the state bar association submitted a proposal in 1930 for a state judicial council, which, if it had been enacted into law, would have given the state a judicial council second to none in the Nation.[145] Certain changes have been made in the original recommendations, particularly with reference to membership of the council and its rule-making powers, but an admirable fight has been waged and is being waged by certain members of the bar to give the state a judicial council.[146]

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[142] The importance of giving a judicial council authority to secure reliable statistics is indicated by a study of the judicial council reports of Virginia especially. The state has no system of judicial statistics and the council is without authority to demand reports from court officials.

[143] Probably the best source of information as to what judicial councils are doing, aside from their own periodic and special reports, is the *Journal of the American Judicature Society,* especially XIV, 17-34, 58-60 (1930); XV, 15-19, 53-54 (1931); XVI, 14-16, 51-54 (1932); XVII, 24-29 (1933).

[144] *Report on a Survey of the Organization and Administration of State and County Government in Mississippi,* 473.

[145] A copy of this proposal may be found in 3 Mississippi Law Journal, 30-31 (1930).

[146] See particularly the same Journal for November, 1932, and October 1933. The proponents of the judicial council have recently prepared a draft act for a judicial council which act will probably be presented to the Legislature during the present session. It is hoped to get a more nearly unanimous support from

Opposition to the proposed judicial council has been voiced by worthy and able members of the bar. One of the chief points of attack has been upon the proposed rule making power of the council. Under one proposal the Supreme Court would have been required to approve proposed rules before they became effective. Surely this would have furnished ample protection to honest litigants. As a matter of fact a goodly portion of our law, both substantive and procedural, has been developed by courts, not necesarily our own, and not by legislative bodies. A casual reading of a treatise on torts, contracts, or some other branch of the law should convince one of the truth of this statement.[147] Nevertheless, the State Bar refused to approve the recommendations of the committee in charge.

The opponents of the judicial council have cited no examples where the Supreme Court has abused its powers in the past, nor even expressed any fear that it will abuse those, now possessed, powers in the future. It seems strange that such profound fear should have been entertained when it was proposed to grant the court, expressly, some additional powers over procedural rules. We need not fear judicial tyranny in the state so long as that august tribunal, the United States Supreme Court, sits to see that our procedure meets that Court's requirements for a "due process of law."[148]

Except in arguments against the proposed judicial council in Mississippi, the writer has not seen the proposition advanced that simplified rules of procedure will mitigate against the litigant who has no attorney, or an inexperienced attorney. In complexity there is justice, if we are to accept this line of reasoning.

But aside from the rule-making powers, the judicial council can perhaps be justified upon other grounds. Would any one contend that the Congress of the United States could enact the great amount of important legislation required of it annually, or at least in sessions like

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the bar members by submitting a proposal for a weak judicial council. Further reference to this draft act will be made below. It is available only in manuscript form at this writing (March 6, 1934).

[147] It is not generally conceded, especially by the courts themselves, that courts make law. The writer does not wish to enter into a discussion of this controversial matter. Some attention was given it in the discussion of the Supreme Court, above. It is submitted that if one can read the following cases without being convinced that courts legislate he is harder to convince than is this writer. The cases are: *Oppenheim* v. *Kreidel,* 236 N. Y. 156, 140 N. E. 227 (1923); *Waters* v. *Moss,* 12 Cal. 535 (1859); *Morris* v. *Fraker,* 5 Colo. 425 (1880); *Irwin* v. *Phillips,* 5 Cal. 140 (1855); *Bear River & Auburn Water & Mining Co.* v. *N. Y. Mining Co.,* 8 Cal. 327 (1857).

[148] Justice Holmes, while a member of the U. S. Cupreme Court, once wrote: "The power to tax does not mean the power to destroy as long as this court sits." It might with equal truth be said: "The power to make rules of procedure does not mean the power to deprive one of a due process of law as long as this court (U. S. Supreme Court) sits."

the one in the spring and summer of 1933, if it did not use expert committees (standing committees of the houses) to make investigations, study and draft bills?[149] Only the uninitiated would contend that legislation buds and comes to full bloom in legislative halls, except of course, in a strictly legal or technical sense. Also an unbiased study of the activities of the Mississippi State Bar Association (or its successor organization, the Mississippi State Bar), through its various committees, will convince any one that this organization has been the sponsor for much wise and progressive legislation in the state. We live in an age when proposed legislation, especially that of a reform nature, must have a sponsor.

The ability and prestige of a commission of experts, such as would be provided in the proposed judicial council in Mississippi would doubtless qualify it as a sponsor for proposals designed to bring about reforms in the administration of justice, whether the final approving authority were a supreme court or a legislative body. The advantage of having a body of this sort is that the members can and very likely will give time and study to the needs of the courts, rather than let the chairman of the committee do the work as is so often the case with bar association recommendations.

It may be worth while in this connection to examine some of the results brought about through the work of the Massachusetts Judicial Council. Examining seven annual reports made by this council from 1925 to 1931 inclusive, we find that it drafted, and submitted to the legislature, sixty-nine draft acts having to do with the organization and procedure in the courts or with the substantive laws of the state. At least thirty-three of these resulted in legislative enactments embodying substantially the changes proposed in that number of recommendations. Some idea of the importance of these acts can be secured by a mere listing of a dozen of them:

1. An Act to Further the Administration of Criminal Law.
2. An Act to Provide for the Election of Jury Trial in Criminal Cases in the Municipal Court of the City of Boston and for the Review of Sentences there Imposed.
3. An Act to Provide for Waiver of Jury Trial in Criminal Cases (other than Capital) in the Superior Court.
4. An Act Concerning the Jurisdictional Limits of District Courts in Civil Cases (increasing it).
5. An Act Concerning Admission to the Bar.
6. An Act Relative to the Disposition of Minor Violations of Motor Vehicle Laws and Traffic Regulations.

[149] Congress secures assistance from sources outside its own membership, or even outside the government service. It is generally conceded that the N.I.R.A. of 1933, was drafted by a professor in a well known law school.

7. An Act Relative to Sittings of the Superior Court (to sit more often).
8. An Act Relative to Appeals from Appellate Divisions of the Superior Court (to simplify method).
9. An Act to Authorize More Abbreviated Methods of Decision and More Abbreviated Reports of Decisions of the Supreme Judicial Court.
10. An Act Providing Procedure to Encourage Prompt Informal Trials in the Superior Court for Disposing of Motor Vehicle Cases.
11. An Act to Provide for Comfort of Witnesses in Court.
12. An Act to Create an Administrative Committee for Probate Courts.

The acts enumerated are sufficient to show that improvement in the administration of justice is being taken very seriously in the Bay State. It must not be understood, however, from this discussion of acts proposed and acts passed that the council in Massachusetts is a mere bill factory. During the seven-year period special reports were made upon twenty-five different subjects by the council at the request of one or both houses of the legislature. Some of these reports were accompanied by draft acts; others were not.

Thus it can be seen that a so-called weak judicial council—as has more recently been proposed in Mississippi—can bring about good results when it functions properly. However, this does not mean that a strong judicial council, the kind that was originally proposed in Mississippi, would not have accomplished much more and perhaps in a shorter period of time.

Although the writer believes that the strong judicial council would be better for the state, there are some features of the presently proposed judicial council act that appear superior to the corresponding provisions in the original act. The provision for a full time paid secretary, as now proposed, seems preferable to the orginal proposal for an *ex officio* secretary.[150] The original proposal had no adequate provisions relative to the gathering of data. The present draft act would empower the judicial council to require court clerks and other court officials to submit reports to the council from time to time.

It is believed that the reports, referred to in the last sentence, should be regularly required on uniform blanks prepared by the council and should be designed to show at all times how each judge or court in the state is disposing of the business before him or it, and to

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[150] No doubt much of the good work done by the Judicial Council of Massachusetts can be ascribed to the fact that this council has a full time paid secretary. However, California uses the clerk of the Supreme Court as secretary of her judicial council with apparent success.

present a true picture of the business pending in each court or before each judge of the state. The importance of making adequate provision for having reports made is indicated by the following comment relative to reports to the judicial council in California:

> "Reports of court business have been so well made, that were it not for a few inefficient or recalcitrant clerks all court business would be completely shown. After so long a time, stern proceedings are impending as to negligent officials who have a duty to report matters."[151]

The above statement indicates the importance of giving the judicial council adequate authority in requiring reports from court officials. The value of such reports, already referred to above,[152] is made more manifest by the following statement from Professor Willoughby (referring to reports required of federal district attorneys):

> "Apart from the value of such information, the requirement that it shall be furnished places a strong moral pressure upon the judges to handle the business coming before them with dispatch, to the end that their showings may compare favorably with those of their colleagues."[153]

Even the reports required of circuit court clerks for the period from 1925 to 1929 in Mississippi showed conclusively the value of statistical and other data in studying and comparing the work of the various circuit courts.

The value of adequate judicial statistics seems to have been abundantly demonstrated in many jurisdictions. Unless and until a judicial council is established with authority to gather and publish data from the different courts of the state, it is believed the state might well require that reports be sent to, and the results published by, the secretary of state or some other state official.

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[151] "The Work Done by Judicial Councils," *Journal of the American Judicature Society*, XVII, 24-29 at 24 (1933).
[152] See *supra*, note 142.
[153] Willoughby, *op. cit.*, 278.

MISSISSIPPI—STORM CENTER OF SECESSION (1856-61)

PERCY LEE RAINWATER†

IV

THE PERSONNEL AND WORK OF THE CONVENTION OF 1861*

When the Mississippi Convention of 1861 assembled in Jackson on January 7th, disunion had become a reality by the secession of South Carolina on December 20, 1860. The Convention proceeded with its work under the strong belief that the cotton States, each for itself, would in the very immediate future pass secession ordinances. This view of the matter was definitely asserted in the reports of the Commissioners from Mississippi to the planting States.[1] The reports of the Commissioners to the border slave States expressed the opinion that such States would not likely secede unless the federal government undertook to coerce the seceded planting States. In such an event, it was the opinion of the Commissioners that the border States would unite with the planting States to form a southern Confederacy.[2] The Mississippi Convention, placing great reliance upon the correctness of the political situation as set out in the report of the Commissioners, went about the work of disunion with the firm belief that after secession Mississippi would have the co-operation of at least the other planting States. This belief was not unimportant in determining the final acts of the Convention.[3]

The personnel of the Mississippi Convention of 1861 was entirely representative of the social, economic, and political life of the State. There were in the Convention, as Claiborne says, "none of the *perditi homines* of Sallust—men of broken fortunes and ruined characters, who seeking to retrieve their condition, aimed at intrigues, conspiracies, and the storms of revolution."[4] Every member of the Convention had,

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* This is the fourth and last of a series of articles upon this subject. Previous numbers of the series have appeared in preceding numbers of the MISSISSIPPI LAW JOURNAL.

[1] MSS. Correspondence of the Governor for 1860, Series E, No. 49, Reports of Commissioners to other States.

[2] *Ibid.*

[3] MS. H. S. Fulkerson, *A Civilian's Recollection of the War between the States,* Chapter I.

[4] MS. Claiborne papers in possession of Mrs. A. L. Bondurant, University of Mississippi.

to be sure, a stake in the community and was directly interested in maintaining social order and public liberty. But the stake which the great majority of the members of the Convention had in the social and economic order lay rather in the future than in the present. At least sixty out of the hundred members of the Convention were professional men and small slave owners, "planters on the make," the realization of whose ambitions depended upon the preservation of the institution of slavery. As the *Vicksburg Sun* pointed out:

> A large plantation and negroes are the ULTIMA THULE of every Southern gentleman's ambition. For this the lawyer pores over his dusty tomes, the merchant measures his tape, the doctor rolls his pills, the editor drives his quill, and the mechanic his plane —all, all who dare aspire at all, look to this as the goal of their ambition. The mind is used, from childhood, to contemplate it, and the first efforts in life are made with reference to it, and these efforts are all lost if the objects in life should be changed. The mind is thus trained from infancy to think of and prepare for the attainment of this end.[5]

To preserve the institution of slavery was, therefore, the main-spring of the Convention's action.[6] A study, then, of the social, economic, and political status of the members of the Convention reveals a personnel having every desire for the restraints of law and embracing no cabal of disappointed factionalists striving for illegitimate power. The Convention was composed of some of the purest, the ablest, and the most opulent men in the State. The nativity of the members of the Convention indicates something of the tides of immigration into Mississippi during the '30's and the '40's. Sixteen members of the Convention were born in Tennessee; fourteen, in South Carolina; thirteen, in Mississippi; twelve, in Virginia; eleven, in Georgia; eight, in Alabama; six, in Kentucky; five, in North Carolina; two, in each of Pennsylvania and New Jersey; and one, in each of Arkansas, Illinois, Missouri, Ohio, and New York. The nativity of six members of the Convention is unknown. In the Convention there were twenty-three Methodists, sixteen Presbyterians, sixteen Baptists, twelve Episcopalians, two Roman Catholics, one Christian, and thirty members who expressed no church preferences. Seventy-nine of its members were married; twelve were single; and nine were widowers. The oldest member of the Convention was sixty-one, and the youngest, twenty-four. Thirty-two of its hundred members were under forty years of

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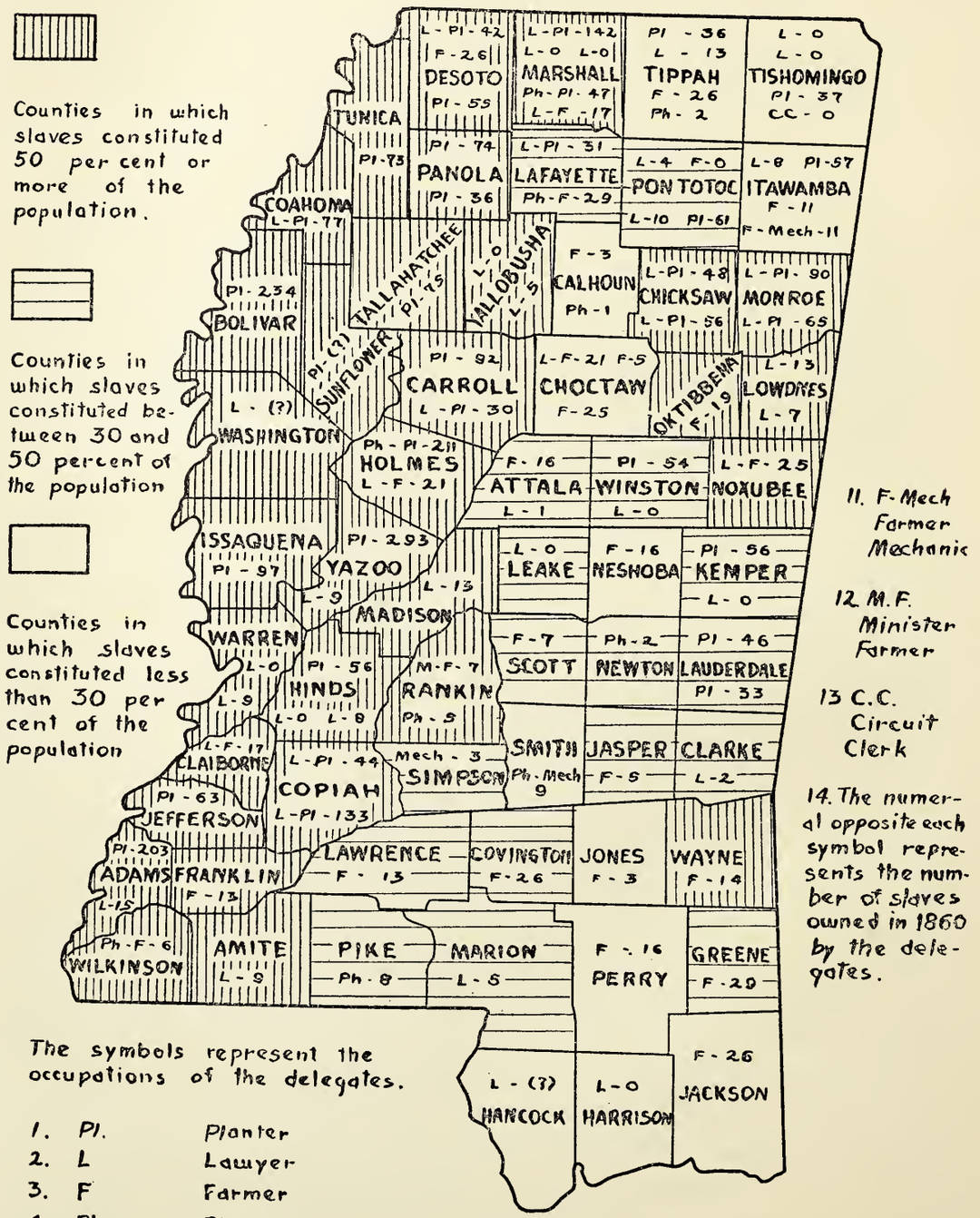
[5] April 9, 1860.

[6] *Official Proceedings of the Convention of 1861* (Declaration of the causes of Secession). See also Ames, *State Documents,* pp. 310-313; Frank Moore, *Rebellion Records* (1861), p. 4 of documents.

THE REFLECTION OF THE DISTRIBUTION OF SLAVES IN MISSISSIPPI UPON REPRESENTATION IN THE CONVENTION OF 1861



age. Classified according to their occupations, the Convention was composed of thirty-three planters, including ten lawyer-planters and two physician-planters; twenty-nine farmers, including five lawyer-farmers, two physician-farmers, one minister-farmer, and one farmer-mechanic; forty-five lawyers, including ten lawyer-planters and five lawyer-farmers; ten physicians, including two physician-planters, two physician-farmers, and one physician-mechanic; one Circuit Clerk; and one mechanic.[7]

The Mississippi Slave Schedule for 1860 shows that the direct and immediate moneyed interest of the members of the Convention in the institution of slavery—at least in so far as actual ownership of slaves was indicative of their moneyed interest—varied widely. At the apex of the social and economic pyramid were to be found the great planters, some of whom, such as Miles H. McGehee of Bolivar, Edward F. McGehee of Panola, and Henry Vaughan of Yazoo, had a million dollars at stake.[8] The base of the pyramid was represented by the majority of the Convention, which either owned no slaves or but few slaves. A grouping of the members of the Convention according to the number of slaves owned in 1860, shows the following:

4 members	owned between 200 and 300 slaves
2 members	owned between 100 and 200 slaves
4 members	owned between 75 and 100 slaves
11 members	owned between 50 and 75 slaves
11 members	owned between 30 and 50 slaves
10 members	owned between 20 and 30 slaves
15 members	owned between 10 and 20 slaves
11 members	owned between 5 and 10 slaves
14 members	owned between 1 and 5 slaves
15 members	owned no slaves
3 members	number of slaves owned is not known because of missing Census returns from the counties they represented.[9]

The social and economic pyramid thus represented in the Convention was a true reflection of that which existed in the State as a whole. That is to say, those counties which showed a preponderance of slave

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[7] *Journal of the State Convention and Ordinances and Resolutions Adopted in January, 1861 with an Appendix.* (See insert containing data furnished by members themselves.) Data of the "insert" compared and somewhat corrected by the *Mississippi Slave Schedule for 1860.*

[8] MS. Claiborne papers (Bondurant).

[9] MS. Compiled from the *Mississippi Slave Schedule for 1860.*

population sent to the Convention planters or lawyers with unequivocal attachment to the plantation system and usually both, if the county were entitled to more than one delegate. In those counties, on the other hand, where the whites out-numbered the slaves, occupational representation in the Convention was more varied. Almost one-half the members of the Convention were lawyers. Of the fifteen members of the Convention who owned no slaves, fourteen were lawyers. The list of the non-slaveholding lawyer-members included Wiley P. Harris of Hinds and D. C. Glenn of Harrison, the latter having been the unanimous choice of his county.[10] Thomas H. Woods, the youngest member of the Convention, has declared that the "Mississippi Secession Convention was adorned, inspired and largely controlled by its lawyer-members."[11] Pre-eminent in this controlling group were Wiley P. Harris, the recognized and unchallenged leader of the bar in the State, whose voice was regarded as the voice of an oracle, and D. C. Glenn, a skilled parliamentarian and unquestionably the most Ciceronian orator in the State, possessing, besides, all the arts and seductions necessary for swaying audiences. The latter, says Claiborne, "took a leading part in all the great debates, and it is detracting from no one to say that he was a master spirit in that body, and originated and carried the most important propositions."[12] Harris and Glenn, ardent proponents of secession, were, along with L. Q. C. Lamar, merely the most capable and adroit of the forty-five lawyer-members of the Convention, all of whom were the representatives of an office-holding aristocracy which ruled Mississippi as like groups, out-side of South Carolina, ruled other Southern States. These lawyer-politicians in the Convention, aside from being irrevocably attached to the State's social and economic system, which both accepted them socially and sustained them professionally, found in the doctrine of States Rights a bar to the aggressive action of the Northern States, as well as a legal justification for secession. Thirty-four out of forty-five of the lawyers in the Convention had a decided leaning towards—if, indeed, they were not actual advocates of—secession when the Convention assembled. The constituencies of the six lawyer-members who voted against the ordinance of Secession on its final passage were definitely and positively opposed to disunion.[13]

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[10] MS. D. C. Glenn, Memoranda of the Convention of 1861, in Claiborne Papers (Bondurant). Official returns from Harrison county give one vote against Glenn.
[11] *Pub. Miss. Hist. Society,* VI, 94.
[12] MS. Claiborne Papers (Bondurant).
[13] See *Official Proceedings of the Mississippi Convention of 1861;* and the Returns for the election of delegates to the Convention of 1861—in the counties of Adams, Amite, Tishomingo, Ittawamba, and Warren.

Party lines which had divided Mississippi since 1840 were non-existent in the Convention of 1861. Both Whigs and Democrats, elected for the most part without regard to party lines, composed the Convention. From the ranks of the old Whig party, there were James L. Alcorn, J. S. Yerger, Walker Brooke, T. A. Marshall, George R. Clayton, Francis M. Rodgers, Josiah Winchester, H. W. Walter, Charles D. Fontaine, and many others less known. Leaders from the Democratic host included William S. Barry, L. Q. C. Lamar, Wiley P. Harris, Henry T. Ellett, A. M. Clayton, D. C. Glenn, Samuel J. Gholson, James Z. George, J. W. Clapp, and Jehu A. Orr. All members of the Convention, of whatever party—although finding the doctrine of States Rights both a convenient plea in estoppel of Northern aggression and, in the case of almost all, a legal right of secession—were united upon the great question that the institution of slavery ought and must at all hazards be preserved. The best means to be employed for making secure the institution of slavery was the sole great question which divided the Convention. Every other question was incidental to, and revolved about, this one question upon which all were agreed.

With reference to the means which would best serve the end of perpetuating slavery, there were four classes of delegates in the Convention. First, there were in the Convention a few uncompromising disunionists *per se,* of whom C. D. Fontaine of Pontotoc was the best known. Second, there were the moderate secessionists, who were for secession upon reasonable assurance that the cotton States would join in the movement. In this class were Wiley P. Harris, D. C. Glenn, L. Q. C. Lamar, and, in fact, the majority of the Convention. This group believed that better terms could be made with the free States after secession than while in the Union. Third, the Co-operationists, who were for giving the Lincoln Administration a fair trial; who were for fighting for the State's rights in the Union from behind the barriers of the Constitution; and who were for resorting to secession only with the united support of all the slaveholding States when the Constitution had proved inadequate to protect slavery in the States. In this class of Co-operationists were lawyer-delegates such as Walker Brooke and T. A. Marshall, and most of the larger planters, such as Miles H. McGehee, Edward F. McGehee, and A. K. Farrar. Fourth, there were a few Union men in the Convention who believed that secession would be but another grievance and no remedy. In this latter group were James L. Alcorn, Josiah Winchester, and the delegations from the Northeast counties of Ittawamba and Tishomingo, where the great

majority of the population was from East Tennessee and strongly Union in sentiment.[14]

On the morning of the 7th of January, before the convention assembled formally at noon, a majority of the delegates met in a caucus for the purpose of expediting the matter of organization.[15] The final action of the Convention was foreshadowed by the election of W. S. Barry of Lowndes as President and the appointment of L. Q. C. Lamar as the Chairman of the Committee of Fifteen, charged with the duty of preparing an Ordinance of Secession. The Commitee were fairly divided between the Democrats and the Whigs, but preference was given to those Whigs who had been won over to secession. D. C. Glenn was appointed on the committee but declined in favor of a secession Whig, Orlando Davis of Tippah.[16] Only four members of the Committee were definitely opposed to immediate secession—namely, James L. Alcorn of Coahoma, Walker Brooke of Warren, E. H. Sanders of Attala and John A. Blair of Tishomingo. On the night of the 7th, the first day of the Convention, the Ordinance Committee met for a discussion of the proposed Ordinance, which, as a matter of fact, Lamar had previously prepared and brought with him to the Convention.[17] The Opposition minority on the Committee refrained from bringing out a minority report and confined its interposition to the offering of amendments on the floor of the Convention. Inasmuch as the Convention was in secret session during the brief debates—confined largely to those unfavorable to secession—on Lamar's report, there is no record of the arguments presented. The secession members of the Convention, realizing that they were on the steam-roller, and not under it, took no part in the debate because they did not wish to delay action by unnecessary words.[18]

Three amendments were offered to the Ordinance reported to the Convention by Lamar's Committee. The first amendment, offered by

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[14] The classification of the members of the Convention, as above indicated, is supported by an editorial in the *Vicksburg Whig,* January 9, 1861 and by the "insert" in the *Official Proceedings* of the Convention. A. B. Bullard, a member of the Convention from Ittawamba, declared that the delegation of which he was a member represented a constituency of 17,000, not more than 200 of whom favored immediate secession. See MS. Claiborne Papers (Bondurant).

MS. James M. Jones to Andrew Johnson, December 29, 1860, Johnson Papers, Vol. 3, pp. 607-609 describes the strong Union sentiment in Tishomingo county, which returned a majority of 1,200 in favor of Union candidates to the Convention.

[15] *Natchez Free Trader,* January 8, 1861.

[16] MS. Claiborne Papers (Bondurant).

[17] *Natchez Free Trader,* January 4, 1861; *Vicksburg Whig,* December 28, 1860. Lamar's Plan of Secession was somewhat modified in the Committee.

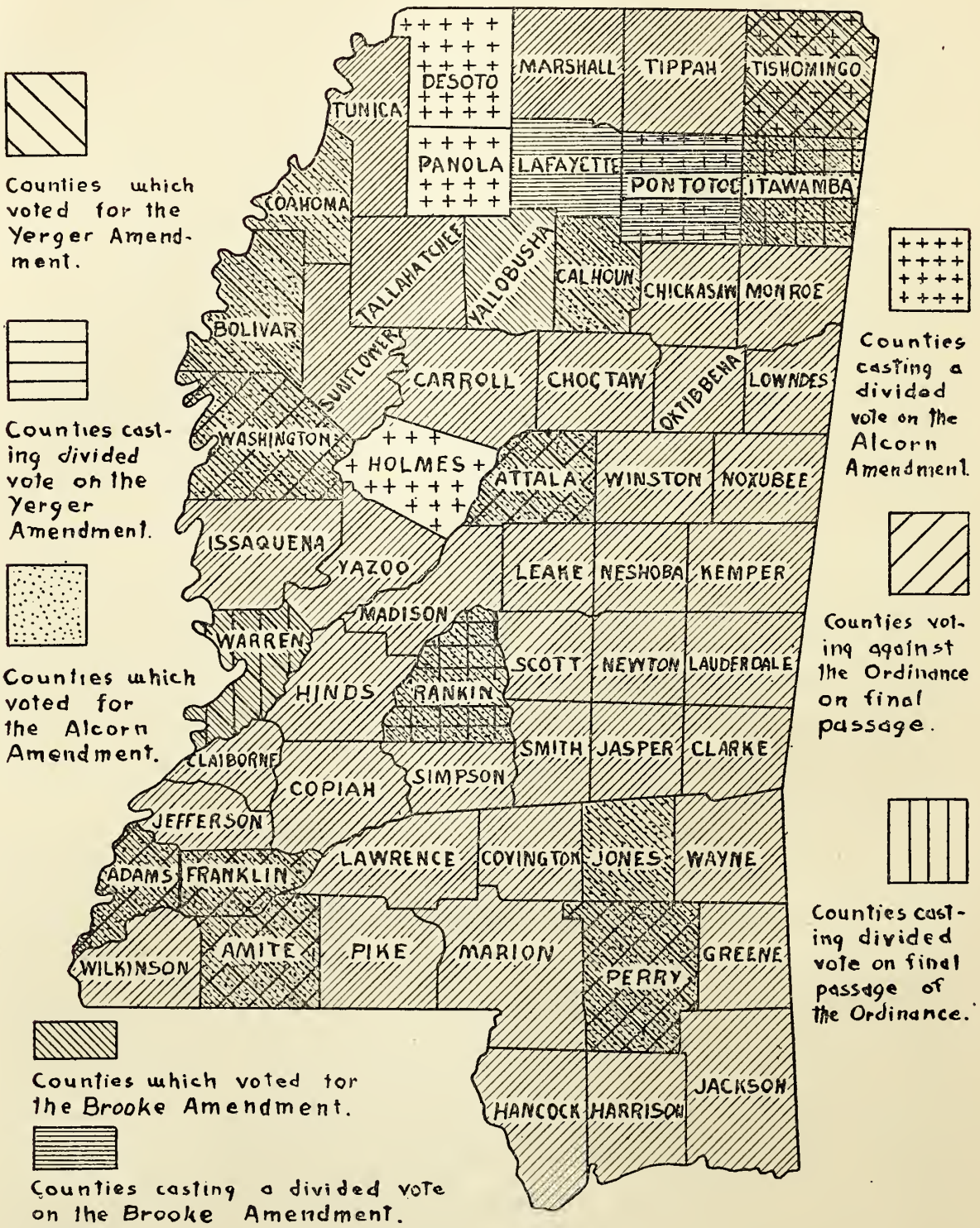
[18] Woods, Thomas H., "The Mississippi Secession Convention 1861," *Miss. Hist. Soc. Pub.,* VI, 98.

J. Shall Yerger of Washington county, was in the nature of a substitute for the Ordinance and was entitled "An Ordinance providing for the final settlement and adjustment of all difficulties between the free and the slave States of the United States, by securing further guarantees within the present Union." Judge Yerger's lengthy and ably written substitute Ordinance was defeated by a vote of 78 to 21.[19] A few of the Opposition, such as James L. Alcorn, did not vote for the Yerger Amendment because they knew that the tide of secession could not be stemmed and they feared that a vote against secession would place them in a bad position before the people to whom they labored to get the Ordinance of Secesion referred before it became effective.[20] The second amendment, offered to the Ordinance reported by Lamar, was proposed by James L. Alcorn and provided that the Ordinance of Secession should not become effective until at least the States of Alabama, Florida, Georgia, and Louisiana should, through their respective conventions, resolve to secede from the Federal Union. This Amendment was proposed in the spirit of political trimming designed for the purpose of placing those who were really opposed to secession on record as approving it upon the contingency set out in the amendment. By thus committing themselves to secession by concert with the planting States, the Opposition was clearing the ground for an appeal to the people who might otherwise deny them a hearing as being "cowards," "submissionists," and deserters of the South. Alcorn's amendment was defeated 74 to 25.[21]

Such of the Opposition forces in the Convention as had not been swept, as it were, from their Union moorings by the complex of emotional appeals which from all sides converged upon them, polled their full strength on an amendment offered by Walker Brooke of Vicksburg that the Ordinance of Secession not become effective until ratified by the people in an election to be held for the purpose on February 1, 1861. This amendment, said Claiborne, was intended "to give the people time for deliberation while we stood on the brink of the vast abyss."[22] It is certain that the amendment represented the *dernier ressort* of the Opposition. Brooke's amendment suffered the fate of the two preceding ones and was defeated in the Convention by a vote of 70 to 29.[23] The vote on this amendment is, however, a much more true index to the Union strength in the Convention than that of 85 to

[19] *Journal*, p. 9.
[20] MS. Fulkerson, H. S., *Civilian's Recollections*, Chapter I.
[21] *Journal*, p. 9.
[22] MS. Claiborne Papers (Bondurant).
[23] *Journal*, p. 10.

THE VOTE ON THE MISSISSIPPI ORDINANCE OF SECESSION



15 on final passage of the Ordinance.[24] The fifteen votes against the Ordinance on its final passage represented only the most uncompromising portion of the Opposition forces—in other words, the "die-hards." The Ordinance being passed, very extraordinary efforts were made to get it signed by each and all of the hundred members who composed the Convention. The effort failed. Dr. J. J. Thornton of Rankin county purposely remained away from the Convention on the 15th of January, the day the Ordinance was signed, because he had determined not to sign it. Another member of the Convention, John W. Wood of Attala, was unavoidably absent—and had been for most of the sessions of the Convention—on the day of the signing but he said that he would not have signed the Ordinance.[25] Certainly Wood's opposition was well known. Thus the Mississippi Ordinance of Secession was signed by ninety-eight of the hundred members who composed the Convention.

The work of the Opposition in the Convention centered around the leadership of James L. Alcorn of Coahoma, who, besides being a lawyer-planter, was President of the Board of Levee Commissioners at an annual salary of $6,000.[26] Being especially strong and influential in the River counties, Alcorn had been, during the canvass for delegates to the Convention, exceedingly active against the secession movement. He was supported by the Opposition for President of the Convention and was by common consent looked to as the leader of the Union minority. All efforts to amend the Ordinance of Secession having failed, Alcorn led the Opposition to vote for Ordinance on its final passage. When, accordingly, his name was called, Alcorn arose and said:

> "Mr. President: I have thought that a different course in regard to the settlement of this great controversy should have been adopted, and to that end I have labored and spoken. But the die is cast—the Rubicon is crossed—and I enlist myself with army that marches on Rome. I vote for the Ordinance."[27]

In explanation of the course pursued by the Opposition—in either voting for the Ordinance or signing it after it was passed—Alcorn, some twenty years after his dramatic speech announcing his vote for secession, discussed at some length the many considerations which determined their rôle in the Convention. In this connection, Alcorn, said:

> When the Opposition became impressed with the fact that the current in favor of voting the State out of the Union was not to be stayed or modified by us, we directed our efforts to the proposi-

[24] *Journal,* p. 10.
[25] MS. Fulkerson, H. S., *Civilian's Recollections,* Chapter I.
[26] *Ibid.*
[27] *Journal,* p. 11. Walker Brooke of Vicksburg made similar statement on announcing his vote for the Ordinance.

tion of referring the action of the Convention to the people for their ratification or rejection. We did not suppose there would be much opposition to this proposition, many of the Secessionists speaking encouragingly, making the Opposition quite confident of success for a time. It was a fact that a majority of the Secessionists were elected upon the express pledge to their constituents that they would not vote for the secession of the State except in co-operation with other slave States, and as such co-operation was practically impossible, the Opposition forced the majority to the wall when attempting to justify their advocacy of prompt secession.

I proposed that the Unionists would sign the Ordinance if the majority would permit its reference to the people. This proposition was at one time informally agreed to but the secession sentiment grew apace; and the Unionists found their hope to be a delusion and themselves powerless for any impression on the Convention.

In this dilemma a caucus of the minority was called. I was called to the chair and the deliberations of the caucus were continued through many sessions. The speeches were able and impassioned. Predictions as to the results and consequences of secession, and the danger of taking the slave from under the protection of the Constitution and putting his freedom up to be fought for in the face of the prejudice of the whole world, were eloquently set forth. Judge J. S. Yerger was especially eloquent in picturing the workings of the Conscription (which would of necessity be resorted to) upon the non-slaveholding classes of the South. I undertook to give a picture of the South when the Northern soldier would tread her cotton fields; when the slave would be free and the proud Southerner struck to the dust in his presence. What shall we do? The Convention now sitting is a body steeped in treason; maddened in the presence of imaginary wrongs; it will listen to no reason; we must appeal to the people; and in appealing to the people we must take upon ourselves, if we would be heard, the crime of secession. Should we fail to commit ourselves, it will be charged that we intend to desert the South; the people will be urged to deny us a hearing; the epithet of coward and submissionist will be everywhere applied to us; we shall be scouted by the masses! But if we shall take upon ourselves the hated vows, our enemies will not be able to turn the faces of the masses against our pleadings. Once more then they will turn upon the enemies of the Union and salute the flag of the fathers.

The debates were prolonged and warm; all were agreed upon the results of secession, but a few were obstinate in their determination to preserve their 'consistency'; to make no bargain with secession; to be guilty of no stultification; and to stand firmly by their flag though struck to the earth under its folds. I and others agreeing with me, determined to seize the wild and maddened steed by the mane and run with him *for a time*. We voted for secession and signed the Ordinance.

There was yet another view which had much weight in determining us to this course. The government at Washington was closely and anxiously watching the action of the Convention, and the people of the North were looking hopefully for signs of divided sentiment at the South. It was clear to all intelligent members of the Convention that unless the people repudiated its action resistance was folly. The Convention grew daily more and more intolerant. Barry, the President of the Convention, was a very eloquent and popular man. When addressing a public meeting towards the closing days of the Convention, he indulged in the following strong and threatening language—in which he but voiced the sentiments of many of his party: 'Should there be found among the people of the State after our labors shall have been closed, any lingering feeling of opposition to our work; should they turn a deaf ear to our appeals; to their duty to the State and from forgetfulness of the love they owe the South, then *a stiff limb and a strong rope vigorously applied will prove a panacea for the infection.*' This language was loudly applauded and I quote it to show the prevailing intolerance of the day to opposition to the popular dogma of the Convention, and I might add, out of it, with many violent partisans.

Thoughtful men would naturally differ with the eloquent young speaker in uttering such language, but we all agreed that the secession movement was being led by bold and determined men. It was plain that a volcano was ready for eruption and that reckless hands were ready with a torch to touch it off. With men who kept their reason, the situation was alarming. Division in the Convention, it was feared by all of us, would encourage Federal aggression. The show of a united and unbroken front might stay the hand of bloody war. Those of the Opposition decided each for himself what he would do and the result is seen in the vote on final passage of the Ordinance. But upon an appeal to the people all were agreed, and having failed to get the Ordinance submitted, they agreed upon a State ticket for the ensuing election, as follows: For Governor, J. S. Yerger; for Attorney General, J. L. Alcorn; for Auditor, S. H. Reynolds; for Treasurer, Miles H. McGehee; for Secretary of State, Thomas Catchings. It was agreed that the nominations should be made at an early date and the canvass be begun, the watchword to be Repeal! Repeal!

The people began soon to show discontent at the anomalous condition of things, the area of discontent enlarging daily, held in check though somewhat, by the drumbeat heard in many quarters. But bye and bye the echo of the guns pointed at Fort Sumter were heard; the country was ablaze with excitement; all hope was gone; the work of ruin was begun.[28]

Thus, according to Alcorn, was reason dethroned; passion ruled the

[28] MS. Fulkerson, H. S., *Civilian's Recollections,* Chapter I. The statements of Alcorn as quoted were made to and taken down by Fulkerson who includes them in his discussion of the work of the minority in the Convention of 1861. Fulkerson likewise includes the verbatim statements of T. A. Marshall, a delegate to

hour and Mississippi "was hurled from its seat of prosperous repose and unquestioned power into the embrace of causeless, cruel, and bloody war."[29]

But Alcorn's retrospective observation, sharpened, no doubt, by the events of the twenty years following secession, was certainly not remotely envisaged either by the great majority of the Convention or by the people. The scene in the Hall, when the vote was being taken on final pasage of the Ordinance, was memorable. Crowded to the point of suffocation with visitors whose "fair hands and lovely forms beckoned the State on to secession," those who really opposed the Ordinance found it difficult to vote against it.[30] Even before the Ordinance was passed "the artillery outside was firing salutes in honor of the position" the State was assuming.[31] "A grand, substantial consummation" was the *Mississippian's* comment on the position of independence asumed by the State.[32] "Bring out the cannon," said the *Natchez Free Trader*, "and let it roar out its loud, reverberating approbation."[33] The *Natchez Courier*, still in an unsanctified state, declared that the passage of the Ordinance, without provision for refering it to the people for acceptance or rejection, was the act of "a dictatorial oligarchy" and that if the people, by sufferance or tacit consent, acquiesced, it would be but "another proof of how easily the people can be deprived of one of their 'inalienable rights.' "[34] But it was no part of the plan of the majority in the Convention, as was indicated by the defeat of the Brooke amendment, to delay matters by submitting the Ordinance to a popular vote. Had the Ordinance been submitted to the people on the first of February 1861, as Brooke's amendment provided, it is highly probable that the people would have ratified the Ordinance by a small majority. The people believed that their institutions were in genuine danger and that the dogma of States Rights, so long taught in the South, would be as powerful in action as it had been in repose. In other words, most

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the Convention from Vicksburg, regarding the actions of the Opposition in the Convention. Marshall statements support the points of view stressed by Alcorn.

[29] MS. Swift, Mrs. Justinia Alcorn, *The Life of James L. Alcorn.* The statement quoted was made by Alcorn in a speech at Friars Point, Mississippi, on July 5, 1876.

[30] MS. Claiborne Papers (Bondurant).

[31] MS. *Ibid.*

[32] January 16, 1861.

[33] January 10, 1861.

[34] January 10, 1861. The *Natchez Courier* of February 16, 1861, declared that there was no rejoicing in Natchez over secession and that the appointment of Jefferson Davis as provisional President was received in Natchez "with regret." "Neither in character nor in politics, has he [Davis] any hold upon the confidence of the people. He has at last attained that for which he has been struggling for ten years past—a Presidency. We may admire the ingenuity with which he has attained his object, and yet despise the tricks by which he has crawled to it." The *Courier* declared that the editorial appearing in the *Free Trader* of February 12, 1861, describing the "Great Demonstration" and the "Great Rejoicing of the People" over Davis's election to the Presidency, was designed for influence abroad rather than as an accurate description of the feelings at home.

of the secession leaders and almost all the people believed that secession would be peaceable. Therefore, the people acquiesced in the Ordinance. H. S. Fulkerson, among other conservatives, believing that war was impending, had opened correspondence with a firm in Brussels, Belgium, which manufactured arms and, accordingly, about the time the State seceded from the Union, appeared before Governor Pettus with samples of the most improved arms and urged the Governor to purchase in quantities. Fulkerson relates further that the Governor admired the guns very much and that being "an old hunter, he shot away much ammunition trying to hit an imaginary Yankee at long range" but expressed the view that there was not going to be any war and that, therefore, the State would have no use for the guns. He then, according to Fulkerson, retired to the Governor's office at the Statehouse, "where he entertained me with one of his best bear stories."[35]

The Union minority, having been unable to stem the tide of secession, cast in its lot with that of the State and of the South, although, in the case of many individuals, the transition was made with great reluctance and with many misgivings. B. L. C. Wailes expressed this spirit when, on February 22, 1861, he confided the following to his diary:

> This is the anniversary of the birth of the immortal Washington and is to be celebrated in Natchez by Military parade, torch-light procession, and illuminations tonight and the reading of his Farewell Address with a glorification of the destruction of our glorious Union and Republic, the admiration and the hope hitherto of the world—a strange desecration of the day.
>
> But in this *fast* and *enlightened* age young America regards the purest and the greatest patriot that ever lived as nothing more than an *Old Fogie*. May a kind Providence save us from the madness and folly of the people who seem determined to prove themselves incapable of self government.[36]

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[35] MS. *Civilian's Recollections,* Chapter II.

[36] Wailes was himself too old for military duty. Two of his sons volunteered for duty in the Confederate armies.

The Adjutant General of the United States, in a letter to the writer, credits Mississippi with 545 enlistments of white men and 17,869 enlistments of Negroes in the army of the United States during the Civil War.

The voluminous unpublished correspondence of William L. Sharkey for the months of May to August, 1865 reveals many letters from Mississippi soldiers who had served in the army of the United States during the war. Most of the Mississippians, it appears, who fought with the armies of the Union during the war came from the Northeast counties of the State. See especially the following letters:

Ira McDowell to W. L. Sharkey, Choctaw County, Mississippi, June 22, 1865.

W. M. Pollan to W. L. Sharkey, Greensboro, Choctaw County, Mississippi, July.

Nathaniel B. Robertson to W. L. Sharkey, Memphis, Tennessee, July 19, 1865.

A. F. Whitehearst, W. F. Barber, S. C. Brannon to W. L. Sharkey, Pulaski, Tennessee, July 15, 1865. [This letter states that fifty Mississippians from Tishomingo County were enlisted in the 6th Tennessee Cavalry Volunteers (U. S.).]

W. T. Rowland to W. L. Sharkey, Tippah County, Mississippi, August 11, 1865.

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NOTES AND COMMENT

THE BURDEN OF PROOF AS TO TESTAMENTARY CAPACITY AND UNDUE INFLUENCE IN WILLS

I. Testamentary Capacity

The question as to the burden of proof in a will contest, where the issue is testamentary capacity, has given rise to no little discussion by the courts and text writers. There is a manifest lack of uniformity in the cases and opinions, and any attempt at absolute reconciliation would be futile. However, it should be interesting to observe a few of the reasons inducing such contrariety of views.

It seems to be the general rule, and that followed by perhaps a majority of the cases, that the burden of proof as to testamentary capacity is upon the party propounding the will for probate.[1] And this is so in spite of the existence of the presumption of sanity,[2] though it has been said that there is an inconsistency in requiring proof of what the law already presumes.[3] A great number of cases holding that the burden is upon the proponent as to such issue will be found to be based almost entirely upon local statutes making the matter of sanity a condition precedent to execution of a valid will.[4] It is said that the right to make a will is not one arising out of the common law, but is created by the statute in derogation thereof, and that in order for one claiming rights thereunder to establish them, the burden is upon him to show by a preponderance of evidence that the statutory requirements have been fulfilled.[5] And it has been suggested that such a statute nullifies the presumption of sanity;[6] but, as will be seen, it is not

[1] *Sheehan* v. *Kearney,* 82 Miss. 688, 21 So. 41, 35 L. R. A. 102 (1896); *Prentiss* v. *Bates,* 93 Mich. 234, 53 N. W. 153, 17 L. R. A. 494 (1892); *Murry* v. *Hennessey,* 48 Nebr. 608, 67 N. W. 470 (1896); *Appeal of Norton,* 116 Me. 370, 102 Atl. 73 (1917); *Crowninshield* v. *Crowninshield,* 2 Gray (Mass.) 524 (1854); *Williams* v. *Robinson,* 42 Vt. 658, 1 Am. Rep. 359 (1870); *Barry* v. *Butlin,* 1 Curt. Eccl. 637, 2 Moore P. C. 480, 12 Eng. Rep. 1089 (1838); 1 Alexander, Commentaries on Wills, § 402 (1917); 2 Jones, Evidence (2nd. ed., 1926) § 536; Rood, Wills (2nd. ed., 1926) § 137a; 40 Cyc. 1020. But see 28 R. C. L. 97, where it is stated that the majority rule is otherwise.

[2] "This presumption does not shift the burden of proof, but is to be given due weight in determining the preponderance of the evidence." *Steinkuehler* v. *Wempner,* 169 Ind. 154, 81 N. E. 482, 15 L. R. A. 673 (1907). See also on this point, *In re Barber's Estate,* 63 Conn. 393, 27 Atl. 973, 22 L. R. A. 90 (1893); *In re Roeber's Estate,* 70 Colo. 196, 199 Pac. 481 (1921).

[3] *Barnewall* v. *Murrell,* 108 Ala. 366, 18 So. 831 (1895); 1 Underhill, Law of Wills, § 86 (1900); 1 Alexander, *op. cit.,* § 400.

[4] *In re Baldwin's Estate,* 13 Wash. 666, 43 Pac. 934 (1896); *Carroll* v. *Murphy,* 231 S. W. (Mo.) 642 (1921); *In re Hetherington's Estate,* 132 Minn. 379, 157 N. W. 505 (1916); *Harris* v. *Harris,* 276 S. W. (Tex.) 964, not off. rep. (1925).

[5] *Baldwin* v. *Parker,* 99 Mass. 79, 96 Am. Dec. 697 (1868); *Delafield* v. *Parish,* 25 N. Y. 9 (1862); *In re Baldwin's Estate, supra; Crowninshield* v. *Crowninshield, supra;* 1 Page, Wills (2nd. ed., 1928) § 685; 2 Jones, *op. cit.,* § 536.

[6] *McMechen* v. *McMechen,* 17 W. Va. 683, 41 Am. Rep. 682 (1881).

necessary that the presence of the presumption be disregarded to consistently hold that the burden is upon the proponent. The difference between the degree and mode of proof required, and the nature of the will itself is sometimes said to account for the difference in the effect of the presumption in case of an instrument *inter vivos* and a will.[7]

On the other hand there are a considerable number of cases holding that the burden of proof as to testamentary capacity is upon the contestants, or those who allege the incapacity.[8] The ground for this holding is, that the proponent fulfills his duty when he offers the will and examines the attesting witnesses, and that this, coupled with the presumption of sanity, throws the burden of proof to the contestant to show mental incapacity. But it is submitted that this should not be the necessary effect of such a presumption upon the burden of proof. The burden of proof, strictly speaking, is upon that party who has the risk of non-persuasion of the jury.[9] This burden does not flit about from one party to the other during the course of the trial, but remains stationary. It is fixed by the issues, and may be ascertained even before the trial. It may be said to rest upon the party having the affirmative of the issue, and from this party it never shifts.[10] Specifically, the proponent has the affirmative of the issue, in that he offers and relies upon the instrument, and it is his duty to bring the instrument within the requirements of the wills act by showing that the testator possessed sufficient mental capacity to make the will; and the fact that he may be aided by the presumption that all men are sane should not be deemed to relieve him of his affirmative duty upon the whole case.

Unfortunately, the term "burden of proof" has often been employed by both courts and text writers to indicate the burden of going forward with the evidence, sometimes termed the "burden of evidence."[11] This latter burden is the only one capable of shifting from party to party during the course of the trial. It is a fairly simple matter to understand how the presumption of sanity may be said to satisfy the "burden of evidence," thereby casting the burden upon the opposite party to offer some evidence in rebuttal. But can it properly be said that this presumption has the effect of also shifting the "burden of proof," which already has been fixed by the issues and the pleadings? No, because a fixed rule of law cannot be said to shift.[12] The principle is aptly illustrated by the following quotation from a leading Mississippi case:

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[7] *Gerrish* v. *Nason,* 22 Me. 438, 39 Am. Dec. 589 (1843).

[8] *In re Latour,* 140 C al. 414, 74 Pac. 441 (1903); *In re Goldthorp's Estate,* 115 Iowa 430, 88 N. W. 944 (1902); *Britt* v. *Darnell,* 315 Ill. 385, 146 N. E. 510 (1925); *Williams* v. *Davis,* 192 Ky. 433, 233 S. W. 886 (1929); *Dersis* v. *Dersis,* 210 Ala. 308, 98 So. 27 (1923); *In re McNitt's Estate,* 229 Pa. 71, 78 Atl. 32 (1910); *Brosnan* v. *Brosnan,* 263 U. S. 345, 68 L. ed. 332, 44 Sup. Ct. 117 (1923); 28 R. C. L. 97.

[9] 5 WIGMORE, EVIDENCE (2nd ed., 1923) § 2485; 22 C. J. 68.

[10] *Gaffney* v. *Coffey,* 81 N. H. 300, 124 Atl. 788 (1924); *Seebrock* v. *Fedawa,* 30 Nebr. 424, 46 N. W. 650 (1890).

[11] 22 C. J. 76; 10 R. C. L. 897.

[12] 5 WIGMORE, *op. cit.,* § 2489.

"Now, when the proponent of a will offers the will and the record of its probate, a presumption is thereby raised that the alleged testator had testamentary capacity, and this presumption satisfies the burden of proof in that respect; and the contestant must fail unless he overcomes this by proof on his part. But there is no shifting of the burden of proof, properly understood."[13]

In other words, the effect of the presumption is to shift the burden of introducing evidence to the contestant; but the burden of establishing the fact of sanity remains upon the proponent throughout the trial, and unless he meets this obligation upon the whole case he fails. This looseness of expression in the use of the term, burden of proof, serves to account, in large measure, for much of the conflict upon this point.

After a will has been duly admitted to probate, the courts are practically unanimously agreed that a party who seeks to have the will set aside because of testamentary incapacity has the burden of proof as to such issue.[14] This is either because of statutes making the probate of the will conclusive[15] or *prima facie*[16] evidence of testamentary capacity, or because of the sound reason that after the will has been fortified by a decree admitting it to probate, the party attacking validity of such solemn act should be required to show its invalidity. Missouri seems to be the only state which continues the burden of sanity upon the proponent after probation of the will.[17]

II. Undue Influence

Just as there is a conflict upon the question of testamentary capacity, similarly there exists a conflict as to the question upon whom is the burden of proof as to undue influence. Must the proponent show an absence of undue influence, or must the contestant establish its presence? The latter proposition seems to be supported by the weight of authority[18] and probably the better reasoning, though the former

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[13] *Sheehan* v. *Kearney, supra.* See also, *Gathings* v. *Howard,* 122 Miss. 355, 84 So. 240 (1920); *Norton* v. *Paxton,* 110 Mo. 456, 19 S. W. 807 (1892).

[14] *Higgins* v. *Carlton,* 28 Md. 115, 92 Am. Dec. 666 (1868); *Pepper* v. *Martin,* 175 Ind. 580, 92 N. E. 777 (1910); *Farrel's Adm'r* v. *Brennan's Adm'x,* 32 Mo. 328, 82 Am. Dec. 137 (1862); *Convey* v. *Murphy,* 146 Iowa 154, 124 N. W. 1073 (1910); *Young* v. *Miller,* 145 Ind. 652, 44 N. E. 757 (1896); *In re Singleton,* 8 Dana (Ky.) 315 (1839); *Zinkula* v. *Zinkula,* 171 Iowa 287, 154 N. W. 158 (1915); *Rich* v. *Bowker,* 25 Kans. 6 (1881); *Renn* v. *Samos,* 33 Tex. 760 (1870); 1 Alexander, *op. cit.,* § 401; 2 Jones, *op. cit.,* § 539; Smoot, Law of Insanity, § 533 (1929); 40 Cyc. 1022; 28 R. C. L. 398.

[15] *Clapp* v. *Vatcher,* 9 Cal. App. 462, 99 Pac. 549 (1909).

[16] *McGown* v. *Underhill,* 115 N. Y. App. Div. 638, 101 N. Y. Supp. 313 (1906). See also, *Moore* v. *Parks,* 122 Miss. 301, 84 So. 230 (1920).

[17] *Mowry* v. *Norman,* 223 Mo. 463, 122 S. W. 724 (1909); *Berst v. Moxom,* 157 Mo. App. 342, 138 S. W. 74 (1919).

[18] *Hildreth* v. *Hildreth,* 153 Ky. 597, 156 S. W. 144 (1913); *Miller* v. *Carr,* 94 Ark. 176, 126 S. W. 1068 (1910); *Blackhurst* v. *James,* 293 Ill. 11, 127 N. E. 226 (1920); *Frohman* v. *Lowenstein,* 303 Mo. 339, 260 S. W. 460 (1924); *Appeal of Rogers,* 123 Me. 459, 123 Atl. 634 (1924); *In re Schacht's Will,* 175 Wis. 54, 182 N. W. 981 (1921); *Saxton* v. *Krumm,* 107 Md. 393, 68 Atl. 1056 (1908); *In re Cooper's Estate,* 206 N. W. (Iowa) 95 (1925); *Sansona* v. *Laraia,* 88 Conn. 136, 90 Atl. 28 (1914); *Rasmussen* v. *Evans,* 150 Minn. 319, 185 N. W. 297 (1921); *Petterson* v. *Imbsen,* 46 S. D. 540, 194 N. W. 842 (1923); *Shepard* v. *Shepard,* 161 Mich.

also has its advocates.[19] Where the issue of undue influence is separate and distinct, it is perfectly rational to say that the burden of proof should be upon the party who alleges it. In such case the defense concedes capacity and formal execution of the will, and seeks to prohibit these conceded facts from having their normal operation by showing that the presence of undue influence prevented same.[20] In this respect the defense is in the nature of a confession and avoidance, if not a purely affirmative defense, the burden of proving which is always cast upon the party setting up such affirmative defense.[21] The situation is similar to the case of a plea of undue influence or duress in deeds or contracts, where the burden of proof is upon the party alleging such facts.[22]

On the other hand, those courts which follow the rule that the burden lies upon the proponent hold that the defense is virtually a traverse, which denies that the instrument is the will of the testator.[23] The theory is that it is as much a part of the proponent's case to negative undue influence as it is to show that the testator had sufficient capacity under the statute. Now, it is admitted that if the statute so provides, or is so interpreted as to require, that the testator not only be "of sound and disposing mind," but also "free from all restraint" (or some similar expression), then the holding that the burden of proof is upon the proponent is the only correct one. In such case the fact that the testator was "free from all restraint" is also made a condition precedent to execution of the will, and the burden would properly fall, as in the case of testamentary capacity, upon the party propounding the will for probate to show that all the requirements of the wills act had been complied with. But where the statute does not so provide, and the question is left to be decided by ordinary rules of evidence, then it seems sounder to place the burden upon the contestant, as in case of deeds or contracts.

But it is urged again on the other side that the same rule should not apply in case of a will as applies in case of instruments *inter vivos*. The latter, it is said, are complete on execution, while a will remains ambulatory and revocable until death. The deed or contract has al-

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441, 126 N. W. 640 (1910); *Snodgrass* v. *Smith,* 42 Colo. 60, 94 Pac. 312 (1908); *Park* v. *Whitfield,* 210 Ala. 18, 97 So. 68 (1923); *Baldwin* v. *Parker, supra;* 1 UNDERHILL, *op. cit.,* § 128; 1 PAGE, *op. cit.,* § 713 *et seq.;* ROOD, *op. cit.,* § 189; 2 JONES, *op. cit.,* § 541; 40 CYC. 1150.

[19] *Sheehan* v. *Kearney supra; Isom* v. *Canedy,* 128 Miss. 64, 88 So. 485 (1921); *Patten* v. *Cilley,* 67 N. H. 520, 42 Atl. 47 (1894); 1 JARMAN, WILLS (6th ed. 1910) 68; *Edgerly* v. *Edgerly,* 73 N. H. 407, 62 Atl. 716 (1905). But see, *Albee* v. *Osgood,* 79 N. H. 89, 105 Atl. 1 (1918).

[20] *Gwin* v *Gwin,* 5 Ida. 271, 48 Pac. 295 (1897); *Johnston* v. *Johnston,* 174 Ala. 220, 57 So. 450 (1912); *Kennedy* v. *Dickey,* 100 Md. 152, 59 Atl. 661 (1905); *Scott* v. *Townsend,* 106 Tex. 322, 166 S. W. 1138 (1914); 1 PAGE, *op cit.,* § 189; 29 AM. & ENG. ENC. OF LAW, 104 (1896).

[21] 5 WIGMORE, *op. cit.,* § 2486. See also, *In re Kindberg's Will,* 207 N. Y. 220, 100 N. E. 789 (1912).

[22] *Willemin* v. *Dunn,* 93 Ill. 511 (1879); *Millican* v. *Millican,* 24 Tex. 426 (1859); *Wheery* v. *Latimer,* 103 Miss. 524, 60 So. 642 (1913); *Douglas* v. *Ogle,* 80 Fla. 42, 85 So. 243 (1920); *Conant* v. *Jackson,* 16 Vt. 335 (1884); *Hassell* v. *Hassell,* 201 Ala. 190, 77 So. 716 (1917); 29 AM. & ENG. ENC. OF LAW, 110.

[23] *Sheehan* v. *Kearney, supra;* 1 JARMAN, *op. cit.,* 68.

ready come into existence, is an established instrument, and must be set aside; while the will must be established. The object, it is said, is not to destroy the effect of an instrument already established, but rather to originally establish it.[24] And while the argument is not without merit, yet it seems too academic and technical, as indicated by the almost entire lack of consideration given it by the courts. The fact remains that the defense or allegation is essentially affirmative. And by the ordinary and primary rules of evidence it is a well-known fact that a negative does not admit of as simple proof as does an affirmative. Of course, where a party asserts a negative as a part of his case, he is required to prove it; but where the other party asserts an affirmative, the former is not obliged to prove the negative.[25] The rule is one of both reason and convenience. From a common sense viewpoint, the contestant who alleges undue influence certainly has a better opportunity to produce evidence to prove the presence of undue influence (if there be any), than has the proponent to produce evidence to prove a lack of undue influence. Both reason and justice are behind the rule which places the *onus probandi* upon the contestant as to this issue.

Unfortunately, many of the courts holding the burden of proof as to undue influence to be upon the contestant have allowed the effect of presumptions and inferences to work an entirely unnecessary confusion in the opinions. For example, though the general rule is admitted that the burden is upon the contestant, the existence of confidential relations between the testator and a legatee or beneficiary is said to give peculiar opportunity for the exercise of unlawful influence upon the mind of the testator, creating the presumption or inference of undue influence and that such influence was exercised, which is said to shift the burden to the proponent to show that such was not the fact.[26] But the mere presence of suspicious circumstances, or of an "opportunity" to unduly influence the testator's mind, in the absence of some showing that the opportunity was exercised, is held to be insufficient to shift the burden.[27] Those confidential relations said to shift the burden of proof are held to exist in cases of guardian and ward,[28] attorney and client,[29] religious adviser and layman,[30] physician

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[24] Joseph Warren, "Fraud, Undue Influence, and Mistake in Wills," 41 *Harvard Law Review,* 309 (1928); Ralph W. Gifford, "Will or No Will? The Effect of Fraud and Undue Influence on Testamentary Instruments," 20 *Columbia Law Review,* 862 (1920).

[25] "The obligation of proving any fact lies upon the party who substantially asserts the affirmative of the issue." 1 GREENLEAF, EVIDENCE (12th ed., 1866) § 74.

[26] *Scarbrough* v. *Scarbrough,* 185 Ala. 468, 64 So. 105 (1913); *In re Lockwood,* 80 Conn. 513, 69 Atl. 8 (1908); *Leonard* v. *Burtle,* 226 Ill. 422, 80 N. E. 992 (1907); *Conklin* v. *Conklin,* 165 Mich. 571, 131 N. W. 154 (1911); *In re Tutty's Will,* 87 N. J. Eq. 647, 102 Atl. 833 (1917); *In re Everett's Will,* 153 N. Car. 83, 68 S. E. 924 (1910); 1 PAGE, *op. cit.,* § 716; 2 JONES, *op. cit.,* § 541; ROOD, *op. cit.,* § 191.

[27] *In re Hotchkiss' Will,* 88 Conn. 655, 92 Atl. 419 (1914); *Ginter* v. *Ginter,* 79 Kans. 721, 22 L. R. A. (N. S.) 1024, 101 Pac. 634 (1909); *Scarbrough* v. *Scarbrough, supra; In re Armstrong,* 23 N. W. (Wis.) 407 (1885); 1 UNDERHILL, *op. cit.,* § 137; 1 PAGE, *op. cit.,* § 716..

[28] *Breed* v. *Pratt,* 18 Pick. (Mass.) 115 (1836); *Garvin* v. *Williams,* 44 Mo. 465, 100 Am. Dec. 314 (1869). See also, *Meek* v. *Perry,* 36 Miss. 190 (1858).

[29] *Riddell* v. *Johnson,* 26 Gratt. (Va.) 152 (1875); *Jennings* v. *McConnell,* 17 Ill. 148 (1855). *Contra, In re Kindberg's Will, supra.*

[30] *Leighton* v. *Orr,* 44 Iowa 679 (1876); *Lehman* v. *Lindenmeyer,* 48 Colo. 305,

and patient,[31] etc. However, such presumption is held not to arise in all cases of business and social relations, as where the legatee was a partner[32] of the testator, or his business manager.[33] And this is peculiarly true in the case of family influence between husband and wife,[34] parent and child,[35] etc. Such influence is perfectly natural and legitimate, and should be allowed to have its natural effect. But even conceding that the facts justify an inference, or even a presumption, of undue influence, yet it is submitted that the effect should not be to change the "burden of proof," though it may shift the "burden of producing evidence" to the proponent.[36] A situation quite analogous to this is encountered in dealing with the doctrine of *res ipsa loquitur* in personal injury cases. In such case, though a presumption of negligence arises which, in the absence of explanation will justify the granting of a verdict for the plaintiff, yet upon the whole case, considering both presumption and proof together, the burden of proof does not shift, but remains upon the plaintiff throughout the case.[37] The plaintiff must establish the negligence just as the contestant must establish undue influence, though the plaintiff may incidentally be aided by the presumption of negligence, and the contestant by the presumption of undue influence. Hence the burden of proof is fixed, and should remain upon the contestant, unaffected by inferences or presumptions, whether for or against the presence of undue influence.

After a will has been duly admitted to probate there seems to be little doubt that the burden of proof then rests upon the party impeaching the will to show that its execution was obtained through the exercise of an unlawful influence.[38]

In the final analysis, the cases do not differ so much in actual result as the freedom of conflicting language would indicate, since the conflict pertains entirely to a procedural matter and not to one of substance. In most of the cases the identical result would be reached under either view. Many of the cases may be harmonized by observing the confusion in the various uses of the expression "burden of proof."

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109 Pac. 956 (1909); *In re Disbrow's Estate,* 58 Mich. 96, 24 N. W. 624 (1885); *Thompson* v. *Hawks,* 14 Fed. 902 (1883).

[31] *Crispell* v. *Dubois,* 4 Barb. (N. Y.) 397 (1848); *Cash* v. *Dennis,* 159 Iowa 18, 139 N. W. 920 (1913); *Hitt* v. *Terry,* 92 Miss. 671, 46 So. 829 (1908).

[32] *Estate of Brooks,* 54 Cal. 471 (1880).

[33] *Denning* v. *Butcher,* 91 Iowa 425, 59 N. W. 69 (1894).

[34] *In re Allen's Estate,* 230 Mich. 584, 203 N. W. 478 (1925); *In re Donovan's Estate,* 140 Cal. 390, 73 Pac. 1081 (1903); *Gwin* v. *Gwin, supra; In re Spence's Estate,* 258 Pa. 542, 102 Atl. 212 (1917); *In re Watkins' Will,* 81 Vt. 24, 69 Atl. 144 (1908).

[35] *Little* v. *Little,* 209 Ala. 651, 96 So. 928 (1923); *In re Craven's Will,* 169 N. Car. 561, 86 S. E. 587 (1915); *Huffman* v. *Graves,* 245 Ill. 440, 92 N. E. 288 (1910); *Land* v. *Adams,* 229 S. W. (Mo.) 158 (1921).

[36] *Weston* v. *Teufel,* 213 Ill. 291, 72 N. E. 908 (1904); *In re Balk's Estate,* 153 Wis. 27, 141 N. W. 8 (1913); 5 WIGMORE, *op. cit.,* § 2489.

[37] *Loudoun* v. *Eighth Ave. Ry. Co.,* 162 N. Y. 380, 56 N. E. 988 (1900).

[38] *Mordecai* v. *Canty,* 86 S. Car. 470, 68 S. E. 1049 (1910); *Convey* v. *Murphy, supra; Zinkula* v. *Zinkula, supra.*

INCOMPETENCY OF A WITNESS TO ESTABLISH HIS OWN CLAIM OR DEFENSE AGAINST THE ESTATE OF A DECEDENT OR PERSON NON COMPOS MENTIS

The common law rule that a person interested in the outcome of a cause is thereby rendered incompetent as a witness was abrogated both in England and in America about the middle of the last century.[1] In nearly all our states, however, statutes were passed for the purpose of protecting the estates of deceased persons and persons *non compos mentis*.[2] It was generally believed and urged that decedents' estates, but for the exclusionary rule, would be placed in great peril and become an easy prey for the dishonest and unscrupulous. While such fears were not entirely groundless, no doubt they were unduly exaggerated by the feeling that by the abrogation of the common law interest rule the flood gates were thrown open wide enough to endanger the property of the living, and that, certainly, without control, the estates of the dead would be swept away by a veritable tide of perjury. Perhaps, also, there was an element of distrust of the ability of the court and the jury to cope with the problems presented by the altered procedure. But time tries all things, and many observers, of recognized authority, have come to the conclusion that the fears that actuated the legislatures in passing the restrictive statutes were over-emphasized, and that the expediency of the rule is doubtful, for the reason that the remedy is worse than the disease, in that many honest claims are defeated by the exclusion of the evidence by which they might be established.[3]

Mr. Wigmore maintains that all the objections which were urged against the broader common-law exclusionary rule are applicable to the rule as embodied in the statute,[4] and quotes, as bearing him out in his contention, and as typical of the observations of those who are dissatisfied with the results of the rule, two very strong indictments of the present day rule.[5] These quotations are followed by his statement that the "disqualification is deplorable in every respect, for it is based on a fallacious and exploded principle, it leads to as much or more false de-

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[1] 1 WIGMORE, EVIDENCE (2nd ed. 1923) § 576, p. 1002.

[2] 1 WIGMORE, *op. cit.*, § 578, p. 1004, and § 488, pp. 865-911. MISS. CODE ANN., 1930, § 1529.

[3] 5 JONES, COMMENTARIES ON EVIDENCE (2nd ed. 1926) § 2225, p. 4254.

[4] 1 WIGMORE, *op. cit.*, § 578, p. 1005.

[5] "1895. Corliss, J., *St. John* v. *Lofland,* 5 N. D. 140: 'Statutes which exclude testimony on this ground are of doubtful expediency. There are more honest claims defeated by them by destroying the evidence to prove such claims, than there would be fictitious claims established if all such enactments were swept away and all persons rendered competent witnesses. To assume that in any event many false claims would be established by perjury is to place an extremely low estimate on human nature and a very high estimate on human ingenuity and adroitness. He who possesses no evidence to prove his case save that which the statute declares incompetent is remediless. But those against whom a dishonest demand is made are not left utterly unprotected because death has sealed the lips of the only person who can contradict the survivor, who supports his claim with his oath. In the legal armory there is a weapon whose repeated thrusts he will find it difficult, and in many cases impossible, to parry if his testimony is a tissue of falsehoods—the sword of cross-examination. For these reasons, which lie on the very surface of this question of policy, we regard it

cision than it prevents, and it encumbers the profession with a profuse mass of barren quibbles over the interpretation of words."[6]

That there are numerous cases in which the rule works hardship is borne out by the opinion of the Mississippi Supreme Court, as rendered by Griffith, J., in the case of *Huckaby* v. *Jenkins*,[7] in which he says:

> "This is another of the many cases where unfortunately nearly every witness who could give the court the full facts and all the details thereof, is disqualified under section 1917, Code of 1906. This record bears many indications that except for the disqualification of the witnesses who knew the true facts, the testimony would have disclosed a good gift *causa mortis*,—not one *inter vivos*. It being known in advance that by operation of the statute aforesaid it would not be possible to have before him all the facts, it was the responsible duty of the chancellor to make an especial effort to diligently attend each witness that could be and was presented, to closely watch every maneuver, and to take the greatest caution that nothing of value for the purpose of a correct decision should escape him."

As indicative of the fact that the rule produces the same undesirable effect in other states we quote from a recent number of the *Nebraska Law Bulletin*:[8]

> "Instances of the complications arising from application of the statute to the facts of new situations as they arise abound in the reports. The hardships worked under the rule, the difficulty of its application, the discredited and fallacious theory upon which it is based all point to the desirability of the repeal of this last remnant of the common law disqualification for interest."

Certain states have recognized the arbitrary nature of the rule, and have modified the disqualification by allowing the introduction of tes-

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as a sound rule to be applied in the construction of the character of the one whose interpretation is here involved, that they should not be extended beyond their letter when the effect of such extension will be to add to the list of those whom the act renders incompetent as witnesses.'

"1921. Mr. Henry W. Taft, 'Comments on Will Contests in New York,' 30 *Yale Law Journal,* p. 593, at 605. 'This restriction not infrequently works intolerable hardships in preventing the establishment of meritorious claims. Furthermore, it has been enforced with the most rigorous literalness, and has been the occasion of a labyrinth of subtle decisions. A long experience leads me to believe that the evils guarded against do not justify the retention of the rule. In the early development of our jurisprudence the testimony of all interested witnesses was excluded; but experience gradually led to the conclusion that the restriction should be relaxed and more reliance should be placed upon the efficacy of our process of investigation of the truth. Cross-examination, for instance, has been found to be well calculated to uncover a fraudulent scheme concocted by an interested party, and where that has failed the scrutiny to which the testimony of a witness is subjected by the court and by the jury, has proven efficacious in discovering the truth, to say nothing of the power of circumstantial evidence to discredit the mere oral statement of an interested witness.' " 1 WIGMORE, *op. cit.*, § 578, p. 1006.

[6] *Ibid.*

[7] 153 Miss. 359, 121 So. 130 (1929).

[8] 12 *Nebraska Law Bulletin,* p. 289 (1934).

timony of surviving interested witnesses under certain restrictions.[9] Four states have abandoned the rule altogether, but make provision for admission of decedent's hearsay declarations as an antidote to the survivor's testimony.[10] A questionnaire revealed that the great majority of the lawyers and judges in Massachusetts are of the opinion that the new statute, which does not disqualify the survivor, but admits the declarations of the decedent generally, aids greatly in the ascertainment of the truth.[11] Also the Connecticut statute has been well accepted by the bar.[12]

Mississippi, however, continues to apply the rule with all rigorousness, the courts being careful to interpret the statute literally, yet broadening the terms in their application according to their interpretation of the " reason and intendment"[13] of the statute.

In 1857, Mississippi abolished the common law interest rule by statute.[14] The statute, however, provided that "no person shall be a witness in any suit by, or against himself to establish his own claim to an amount exceeding fifty dollars, against the estate of a deceased person." It underwent subsequent changes and was given its final form, as it stands today, in 1896.[15] The statute in its present form only gives more explicit expression to the purpose indicated in the original statute. It provides that "a person shall not testify as a witness to establish his own claim or defense against the estate of a deceased person, which originated during the lifetime of the deceased person, or any claim he has transferred since the death of such decedent." It further provides like protection to the estates of persons *non compos mentis,* and forbids application of the restriction to claims that arose during the administration of the estate.

Most of the decisions of the courts in construing the meaning of the statute center around the determination of the meaning of the word "claim." In one of the outstanding cases soon after the passage of the statute, a tort action to recover damages for battery to a slave,[16] the court interpreted the word "claim" broadly, saying that the purpose of the statute was to prevent the "undue advantage" of allowing the interested party "to testify to matters which took place between him and the deceased, and which, resting entirely in the private transactions between the parties, could not be disproved or explained by reason of the death of the other party." The court excluded the offered

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[9] 1 WIGMORE, *op. cit.,* § 578, p. 1007. New Mexico and Canada allow no recovery in such cases on the party's sole testimony, without corroboration of some sort. Connecticut, Virginia, and Oregon admit, as well as the surviving party, any extant writings or declarations of the deceased party on the subject in issue. New Hampshire and Arizona exclude the testimony, except when it "appears to the court that injustice will be done without the testimony of the party."

[10] "Qualifying the Interested Survivor as a Witness," 46 *Harvard Law Review,* 834 (1933), citing: CONN. GEN. STAT. (1930) § 5608; MASS. GEN. LAWS (1932), c. 233, § 66; ORE. CODE ANN. 1930 § 9-403; R. I. GEN. LAWS (1923) § 5039.

[11] *Ibid.*

[12] *Ibid.*

[13] *Witherspoon* v. *Blewett,* 47 Miss. 570 (1873).

[14] REVISED CODE OF 1857, § 190, p. 510.

[15] LAWS OF 1896, p. 107.

[16] *Lamar* v. *Williams,* 39 Miss. 342 (1860).

testimony of the defendants that the owner, since deceased, had consented. In another action for damages based on a tort, the court said that "the interpretation put upon the statute is broader than its words, but was demanded by its reason and intendment."[17] In an action to foreclose a mortgage after the mortgagor was dead the court held that the assertion of a "right" which originated during the lifetime of the deceased, and out of a transaction with the deceased, was a claim against the estate of the deceased, making the party an incompetent witness.[18] A suit to recover from decedent's estate real property, under a right derived from the deceased while living, was held to be on a "claim or demand" against the estate.[19] An action to remove a cloud on title, by a party claiming under a deed from a person since deceased, has been held by the court to be based on a "claim."[20] The same conclusion was reached in an action to recover possession of personal property.[21] In a comparatively recent case, the appellee had been allowed in the lower court to testify that a brother had taken a certificate of stock without her knowledge and forged an endorsement in obtaining a loan from one, since deceased, though the transaction was accomplished entirely with an agent of the party making the loan, and it was not supposed that the deceased had any knowledge of the circumstances at the time of the transaction.[22] The Supreme Court, in reversing the decision of the lower court, said:

> "The statute does not render the witness seeking to establish his own claim against the estate of a deceased person incompetent alone to give testimony as to the conversation, contracts, and other transactions had with the deceased person. The witness is incompetent under the statute not only as to those matters, but as to any and all facts, circumstances and transactions occurring during the lifetime of the deceased having a tendency to establish the claim of the witness against the estate of such deceased person, whether such facts, circumstances, and transactions took place with, or in the presence of, the decedent, or not."

In the same case the court quotes from the opinion handed down in the case of *Duncan* v. *Gerdine*:[23]

> "It is not what the witness testifies to that makes him competent, or incompetent under the statute, but it is the fact that the controversy is between the living and the dead; and the silence which death has imposed on the one, the law imposes on the other; absolute equality is sought by the statute, and beyond this we do not go in the case cited."

From this it might be reasoned that, though "absolute equality"

[17] *Witherspoon* v. *Blewett, supra,* note 13.
[18] *Jacks* v. *Bridewell,* 51 Miss. 887 (1876).
[19] *Williams* v. *Harris,* 109 Miss. 304, 68 So. 465 (1915); *Graham* v. *Taylor,* 117 Miss. 736, 78 So. 706 (1918).
[20] *Snell* v. *Fewell,* 64 Miss. 655, 1 So. 908 (1887).
[21] *Rushing* v. *Rushing,* 52 Miss. 329 (1876); *Kern* v. *Cooper,* 106 Miss. 895 (1914).
[22] *Brown* v. *Parker,* 143 Miss. 291, 108 So. 492 (1926).
[23] 59 Miss. 550 (1882).

is sought, it is not obtained, and that "to die is gain" for the estate of the decedent, though at the expense of the estate of the living.

To the same effect are the decisions in cases of actions to enforce trusts[24] and actions to cancel deeds.[25]

In *Rothschild* v. *Hatch*,[26] the plaintiff, in ejectment against the heirs of the deceased, was held incompetent to testify concerning statements relative to the nature of his holding of the lands in controversy. But in this case it was held that the assignment of the claim restored the competency of the party. The legislature, to prevent any deviation from the purpose of the act as intended by the legislature, immediately passed an act extending the exclusion to one who had assigned.[27]

Mississippi is one of the half-dozen states which hold that statutes prohibiting witnesses from testifying to transactions with a decedent are applicable to proceedings to probate or contest a will.[28] In the case of *Whitehead* v. *Kirk*,[29] the court distinguishes *Kelly* v. *Miller*,[30] in which an executor and devisee was admitted to testify in support of the will, and *Tucker* v. *Whitehead*,[31] in which the proponent and contestant were both allowed to testify. After reviewing other cases,[32] the court adopted and quoted in its opinion the rule as stated by the counsel for the appellants:

> "Whenever a witness is offered for the purpose of proving a transaction, act, contract, admission, license, condition, etc, (whatever the exact nature), as 'a fact to be proven', and proven as a fact existing or occurring prior to the death, and the proof of such fact as then existing or occurring is determinative of a claim or right directly and finally, there the witness is testifying to his claim which originated during the lifetime of such deceased. In short, the word 'claim', as used in this statute, is employed in a broad and general sense; and it draws into the prohibition all testimony, the direct, immediate, and final effect of which is to establish in the witness' own behalf a right in or to things prior to the death. The statute must be taken as dealing with an effectual claim,—with a claim which means something, and is not a mere shadow. If the issue on the trial is such, in order for the claim to amount to anything, it is necessary to prove or disprove certain facts as existent or nonexistent before the death; for neither

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[24] *Moore* v. *Crump*, 84 Miss. 612, 37 So. 109 (1904); *Coker* v. *Lewis*, 135 Miss. 118, 99 So. 561 (1924).

[25] *Burnett* v. *Smith*, 93 Miss. 566, 47 So. 117 (1908).

[26] 54 Miss. 554 (1877).

[27] Laws of 1878, p. 190.

[28] Jones, *op. cit.*, § 2226, p. 4259. The other states are Illinois, Iowa, Kansas, Texas and Wisconsin.

[29] 104 Miss. 776, 61 So. 737, 51 L. R. A. (N. S.) 187 (1913).

[30] 39 Miss. 17 (1860).

[31] 59 Miss. 594 (1882).

[32] *Griffin* v. *Lower*, 37 Miss. 458 (1859); *Lamar* v. *Williams*, *supra*; *Witherspoon* v. *Blewett*, *supra*; *Jacks* v. *Bridewell*, *supra*; *Rothschild* v. *Hatch*, *supra*; *Neblett* v. *Neblett*, 70 Miss. 752, 12 So. 598 (1893); *Covington* v. *Frank*, 77 Miss. 606, 27 So. 1000 (1900); *Steen* v. *Kirkpatrick*, 84 Miss. 63, 36 So. 140 (1904); *Watson* v. *Duncan*, 84 Miss. 763, 37 So. 125 (1904).

> logically nor legally can the 'claim' be separated from what is necessary to make it effectual, or from anything that flows into it, becomes a part of it, augments and increases it, and fixes, or contributes to fix the scope of it."

The court's interpretation of the policy of the statute, as handed down in *Whitehead* v. *Kirk,* remains undisturbed by any later decision. An annotation to this case points out that in this decision the Mississippi Supreme Court reached the extreme, as compared with other states, in stretching the purpose of the statute to the extent that the right to succeed to a decedent's estate, as widow or heir, amounts to a "claim" against the estate,—a claim originating during the lifetime of the deceased.[33] According to the general opinion, as held by the great majority of the courts of other states, it was not within the legislative purpose or intent to apply the statutes to actions affecting probate or contest of wills, even though many statutes are less favorable to such construction than the Mississippi statute.[34]

The term "defense" in the present statute merely added a word to say what the court had already put into effect as included in the meaning of the word "claim." In *Griffin* v. *Lower,*[35] the court, referring to the statute, said, "Nor should it apply so as to permit a party defendant to be a witness in a suit 'against himself' by the representative of the decedent's estate, so as to discharge himself by proof 'to establish his own claim' as by way of offset or payment." Later cases have followed this decision in holding that it matters not whether the "claim" be set up by the plaintiff against the estate, or whether it be by defense in an action preferred by the legal representative of the decedent.[36]

In the case of *Stuhlmuller* v. *Ewing,*[37] while the disqualification prevented the plaintiff from testifying in his own favor, the wife of the deceased was permitted to testify on behalf of the estate that her husband had stipulated that the plaintiff, a physician, was not to be paid unless he cured him, and that the physician made no reply. It is easily possible for the representative of the estate to have a considerable advantage over the defendant in actions on behalf of the estate. It seems that the legislature did not contemplate the possibility that the representative of the deceased might just as easily improvise a case on behalf of the estate against an individual as for the individual to do likewise against the estate, in which event, the advantage would certainly be with the estate.

The "estate of a deceased person" was held in *Jacks* v. *Bridewell,*[38] and in *Jackson* v. *Johnson,*[39] to include all property, real and personal, belonging to the deceased. In the latter case, the party making claim to part of the estate was not allowed to testify as to a contract, with the deceased, upon which he based his claim.

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[33] 51 L. R. A. (N. S.) 187, at 205.
[34] *Ibid.*
[35] *Supra,* note 32.
[36] 41 A. L. R., p. 1044, at 1051.
[37] 39 Miss. 447 (1860).
[38] *Supra,* note 13.
[39] 126 Miss. 26, 88 So. 410 (1921).

Mississippi allows the interested party to testify if the testimony of the deceased, taken at a former trial, is presented by the representative.[40] Also, the interested party is allowed to testify to lay the foundation for the introduction of his books of account, which, if properly kept, are admissible. And, if the representative of the deceased introduces and examines a claimant, his incompetency is thereby waived,[41] and he may proceed to make proof of his claim.

The decisions are not all harmonious, but the attitude of the court at present is to continue its erstwhile policy both literally and rigorously. In one sense, this is, perhaps, to be commended; for it is within the province of the legislature, not of the court, to make the change, if any is to be made. Yet, on the other hand, when a statute becomes an instrument of injustice, it is commendable in the court to find a way to avoid its harshness, if there be such a way, and if there be none, at least to point out the injustice in such a manner as will attract the attention of the legislature, which alone can give relief.

It is true, as remarked by the Mississippi Supreme Court in *Whitehead* v. *Kirk*,[42] in ruling that certain evidence was inadmissible, that "change does not always denote progress and modern departures from ancient rules of law in response to the exigencies of particular cases frequently obliterate the wisest and safest rules designed for the protection of mankind." The fundamental principles of justice are ancient and unchanging, but the situations to which they must be applied are continually changing. Rules of law which were admirably adapted to the ends of justice in a preceding age, we find in a succeeding age to fail in their purpose. Our greatest members of the bench and bar are those who sense the incongruity of the application of outgrown rules to the changed conditions of society, and point the way to a more practical application of the principles, to the end that society will feel security in the administration of justice. The definite trend of the times is toward the admission rather than the exclusion of evidence, and in answer to objections that may be raised to any change with reference to the statute, we respectfully point to the successful experience of those states where the rigorousness has been taken out of the statute, and especially to those states where evidence is admitted without restriction except for the usual tests of relevancy, weight and credibility, and cross-examination.

ARDEN BARNETT.

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[40] *Drewry* v. *Hopper*, 77 Miss. 744, 27 So. 597 (1900).

[41] *Waldauer* v. *Parks*, 141 Miss. 617, 106 So. 881 (1926); *Birchett* v. *Hundermark*, 145 Miss. 683, 110 So. 237 (1926).

[42] *Supra*, note 23.

WHAT LAW GOVERNS THE ENCUMBERED AUTOMOBILE?

During the past decade or two, with the advent of the automobile, the number of conditional sales contracts and chattel mortgages has greatly increased. Financing by means of conditional sales has become a general and well-established business practice, and the law in relation to these contracts has been greatly supplemented by numerous cases on the subject. The legal duties and legal rights thereunder have been more clearly expounded. But the question involved in numerous of these cases at present day is not one so much of what are the legal rights and duties; rather, with two or more systems of legal rights and duties in existence, the question resolves itself into that of which of the systems will apply. The automobile sold under a conditional sales contract in State A may be quickly moved into State B where rights of third parties may become involved. The rights of the parties under the law in State A may be entirely different from those established in State B. When it does happen that the law is at variance, which law will apply?

Preliminarily, let it be noted that, under the conditional sales contract, the legal title to the property sold remains in the vendor.[1] To the vendee goes the contract right that title shall vest in him upon a certain contingency—the full payment of the purchase price.[2] To be sure, the vendor's legal title may not be used in derogation of the vendee's rights; and similarly the vendee's possession and rights connected therewith may not be utilized in a manner that will lessen the rights of the vendor.[3] Their obligations are fixed by contract; and as between the parties, that agreement is controlling.

In the chattel mortgage, dependent upon the law of the state where the contract is made, the legal title to the property embraced under the instrument, may or may not pass.[4] At all events, however, the legal rights and legal duties of the parties are established; and similarly, as in the conditional sales contract, that instrument, together with the *lex loci contractus,* is controlling as between them.

Primarily, this discussion will deal with conditional sales and chattel mortgages in regard to automobile contracts, though in the discussion, the law applicable to all personal property under conditional sales and chattel mortgages will be discussed, since the legal questions presented are the same.

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[1] *Segrist* v. *Crabtree,* 131 U. S. 287, 9 S. Ct. 687, 33 L. ed. 125 (1889); *Goodgame* v. *Sanders,* 140 Ala. 247, 37 So. 200 (1904); *Schmidt* v. *Ackert,* 231 Mass. 330, 121 N. E. 24 (1918); *Puffer Mfg. Company* v. *Dearman,* 97 Miss. 622, 54 So. 310 (1911); *Truitt* v. *Patten,* 75 Utah 567, 287 Pac. 175 (1930).

[2] *Loverin* v. *Wedge,* 102 Vt. 138, 146 Atl. 248 (1929).

[3] This statement is meant to apply only as to transactions between the parties. The rights of third parties, as *bona fide* purchasers, may often disrupt the right of the vendor to retake the chattel; but even then, the right to payment from the vendee remains as stipulated in the contract. Similarly, the right of the vendor to retake the chattel may be lost where the chattel is used in violation of law. *Goldsmith-Grant Co.* v. *United States,* 254 U. S. 505, 41 S. Ct. 189, 65 L. ed. 376 (1921).

[4] Title passes in chattel mortgage. See discussion, 2 JONES, CHATTEL MORTGAGES & CONDITIONAL SALES (6th ed., 1933) § 699.

Title does not pass. See discussion, 2 JONES, *op. cit.,* § 701.

To state the problem as a hypothetical case: X sells to Y under a conditional sale an automobile; and the sale is completed and delivery made in State A. Y takes the automobile into State B and there sells it to Z, who is a *bona fide* purchaser. (Or the situation may be that M has attached the property in State B as the property of Y, the vendee. Let us assume that in State A, recording of the conditional sale is not necessary to protect X as against innocent third parties, while in State B it is necessary that a conditional sale be recorded if the vendor wishes to protect his rights as against third parties. Z and M are third parties, and in State B no recording has been had and neither Z nor M has knowledge of the conditional sale.

In this situation, which law is to apply? It should be noted that the contract of sale and delivery took place in State A; Z's rights, if any, were brought into existence after the chattel was moved to State B. There is a conflict in the laws of the two states, and the law of one state must control.

As previously stated, if the rights of X and Y were in controversy, the law of State A would control. The reason is obvious: the contract was made and was to be performed in State A, and all matters regarding the contract as between the contracting parties are to be determined by that law.[5] The courts, in the absence of facts showing a different intention, presume that the parties intended to make the law of State A a part of their contract.[6] As between X and Y, States B, C, D, etc., will enforce the contract as provided by the law of State A, nothing against the public policy of those states appearing.[7]

But, with Z, a third party, involved, what will be the result? At the outset, let it be noted that State B, if it enforces the law of State A in regard to this contract, as it applies to third parties, does so only on the basis of comity.[8] It is under no legal compulsion to enforce the rights created by the law of State A and no matter of "full faith and credit" is involved.[9] Generally, however, State B will undertake to apply the law of State A to a contract made in the latter state, if the public policy of State B is not violated in so doing.[10]

There is a division of opinion among the decisions on the question of which law will apply. Some states will enforce the rights of X as against third parties, as provided by State A. Others apply their own system of jurisprudence to the case.

Now, let us proceed to the different possible holdings and the reasons therefor.

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[5] Where the contract is made in State A, to be performed in State B, a different question arises as to which matters of the contract are controlled by State A and which by State B. Here, the contract was made and was to be performed in State A, and the Law of State A controls as to all matters as between the parties. 13 C. J., p. 248, and cases there cited.

[6] 13 C. J., p. 248, and cases there cited.

[7] Goodrich, Conflict of Laws, § 103.

[8] See *Huntington* v. *Attrill,* 146 U. S. 657, 13 Sup. Ct. 224, 36 L. ed. 1123 (1892): "Laws have no force of themselves beyond the jurisdiction of the state which enacts them, and can have extra-territorial effect only by the comity of other states."

Hervey v. *Rhode Island Locomotive Wks.,* 93 U. S. 664, 23 L. ed. 1003 (1877).

[9] Full faith and credit, however, is involved in dealing with foreign judgments. Constitution of the United States, Art. 4, § 1.

[10] Goodrich, *op. cit.,* § 103.

I

A. There is a group of decisions which make the "consent" or "lack of consent" of X the controlling matter in the case. If X consented to Y's bringing the property to State B, without recording, when such was necessary, State B will hold that it is against its public policy to enforce X's rights under the law of State A.[11]

B. But, on the other hand, if the property was brought into State B without X's consent or knowledge, then State B will enforce the rights of X as provided by the law of State A. Under this holding, it is said that no public policy is violated in enforcing the law of State A as applicable to the contract and giving X the rights which he intended to secure by making the contract in that state and in the release of which he has taken no part.[12]

II

A. There is a second group of decisions wherein the matter of consent is not of importance in the consideration of the case, and the final holdings are based largely upon "public policy." Part of the cases in this group hold that despite the different law existent in State B, no fundamental public policy is violated by the application and enforcement of the Law of State A.[13]

B. The other cases in this division hold that, on consideration of the difference in the laws and other related matters, it is against the public policy of State B to enforce the rights created by the law of State A.[14]

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[11] Lehman, J., in *Goetschius* v. *Brightman,* 245 N. Y. 186, 156 N. E. 660 (1927) says: "No rule of comity requires this state to subordinate its public policy in regard to transfer made within the state of property situated here to the policy of the state where the owner of the property resides or where he acquired title. Whoever sends personal property to this state or consents to its removal implicitly submits to the regulations of this state concerning its transfers here."

[12] Lehman, J., in *Goetschius* v. *Brightman, supra,* continues: "Even so we find that the defendants have not acquired title to the automobile . . . Unless a regulation of this state is plainly intended to apply to property brought here without the consent of the owner it is clear that the court should not extend the local rules so as to deprive the owner of those rights to his property which he possessed before the property was wrongfully removed . . . The defendants claim title through a transaction which was consummated before the seller had notice of the presence of the automobile here."

The Restatement of the Law of Conflict of Laws would appear to support this theory based on "consent." See Proposed Final Draft, No. 2, §§ 286-302. To illustrate, consider § 295. "If the vendor under a conditional sale retains title in accordance with the law of the state where the chattel is situated at the time of the sale and the chattel is then taken into another state without the consent of the vendor, the interest of the vendor is not thereby divested nor is it divested as a result of any dealings with the chattel in the second state until the vendor has had a reasonable opportunity to remove it from the second state or until the period of adverse possession in the first state has elapsed."

Professor Goodrich thinks the matter of consent should not control. See Goodrich, *op. cit.,* § 150.

[13] *Flora* v. *Julesburg Motor Co.,* 69 Colo. 238, 193 Pac. 545 (1920); *Barrett* v. *Kelley,* 66 Vt. 515, 29 Atl. 809, 44 Am. St. Rep. 862 (1894); *Overland Texarkana Co* v. *Bickley,* 152 La. 622, 94 So. 138 (1923).

[14] *Turnbull* v. *Cole,* 70 Colo. 364, 201 Pac. 887, 25 A. L. R. 1149 (1920); *Judy* v. *Evans,* 109 Ill. App. 154 (1903). In *Turnbull* v. *Cole* in dealing with a condi-

III

There is still another group which enforce the legal rights created by the law of State A to a certain point; and from that place onward, the law of State B is applied. Under this view, State B recognizes the rights created by the contract and applicable law at the time the property is brought into the state, but then says that State B will furnish the law as to all future transactions.[15] Following this group of cases, the decision in the hypothetical case would be this: At the time that the automobile was brought into State B, X was the holder of the legal title and this legal title under the conditional sale State B will recognize. But at this point it stops. The purchase of the car by Z constituted a separate contract in itself—an individual transaction made and performed in State B. Being a contract made in State B, the law of State B will apply. Under the law of that state, the owner of the legal title under a conditional sale contract is not protected as against third parties, where his contract is not recorded. Consequently, under this theory, the title of Z is good as against X. It should be carefully noted that State B recognizes the legal title conferred on him by the contract and the law of State A; but then considers him as it would the holder of such title under a contract made in State B.

Two recent cases appear in Mississippi upon the subject of the rights of the parties where an automobile, contracted for in another state, is removed to Mississippi, where the interests of third parties become involved. One case deals with a conditional sale; the other, with a chattel mortgage.

In the case of *Harrison* v. *Broadway Motor Co.*,[16] the plaintiff brought action in replevin to recover a car sold by it in Nashville, Tennessee, under a conditional sale contract to one Mooney, which car by mesne conveyances came into the hands of Harrison, by contract entered into within the state of Mississippi. The Tennessee law pro-

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tional sale contract, the Colorado court held a recognition of the law of the sister state against public policy. In *Flora* v. *Julesburg Motor Co., supra* note 13, in dealing with a chattel mortgage, the same court held that no public policy was violated. Reason can be seen for distinguishing between chattel mortgage and conditional sale; but considering their close resemblance, it would seem that the rule would be the same as to both.

See GOODRICH, *op. cit.*, §§ 149-151. Professor Goodrich does not favor the view of making "consent" a matter of prime importance. Apparently, he believes in making "pure" public policy the test; and from his text he favors those decisions holding it not against public policy to enforce the rights of the parties under the law of State A.

[15] *Dougherty Co., Inc.* v. *Krimke,* 105 N. J. L. 470, 144 Atl. 617 (1929). *Mervin Safe Co.* v. *Norton,* 48 N. J. L. 410, 7 Atl. 418, 57 Am. Rep. 566 (1887). In the *Mervin Safe Co.,* case, Depue, J., says: "Where the place of the contract is made also the place of performance, and of the situs of the property, the law of that place enters into and becomes a part of the contract, and determines the rights of the parties to it . . . By his contract, Schwartz obtained possession of the safe, and a right to acquire title on payment of the purchase price, but until that condition was performed the title was in the company. In this situation of affairs, the safe was brought into this state and the property became subject to our laws . . . *By the law of this state,* Norton, by his purchase, acquired only the title of his vendor, . . . only such title as the vendor has when the property was brought into this state, and became subject to our laws."

[16] 128 Miss. 766, 91 So. 453 (1922).

vided that an innocent purchaser did not secure good title as against the conditional vendor, and the Mississippi law provided likewise. Judgment was given for the plaintiff in the lower court and the same was affirmed on appeal.

Holden, J., speaking for the court, stated:

> "Innocent purchasers for value without notice are not protected in this state or Tennessee against the owner of personal property. The first vendee, Mooney, got no title to the car nor did any of the subsequent purchasers because Mooney had no title to convey; the ownership of the car remained at all times in the appellee seller. Certainly, the owner of an automobile may follow it into this state and here enforce his right to possession as against a *bona fide* purchaser for value without notice the same as could be done between resident citizens of our own state. Ownership of personal property is not required to be registered in this state, nor Tennessee, and the rule of *caveat emptor* applies."

The decision is certainly correct. But the court is not clear whether its theory is that Tennessee law applies or whether Mississippi law applies. The law in both states was identical; and therefore, the result would be the same at all events. If the court's intention was that Tennessee law apply, then the reasoning comes within the classification noted as *II A* above. Under that section, the law of a sister state is enforced where the court construes it as not contrary to the public policy of the forum. Yet, if the decision meant to infer that Mississippi law was controlling and applied in the decision of the case, then the reasoning is within classification *III,* above.

In *Vines* v. *Sparks et al.*,[17] a chattel mortgage was given on an automobile in Louisiana and the car was brought into Mississippi without recording. A creditor of the mortgagor attached and from adverse judgment, he appealed. In the Supreme Court, the judgment for the defendant was reversed.

Holden, P. J., delivering the opinion of the court says:

> "It is our opinion that the attaching creditor in the case at bar has a superior right over the mortgagee in the duly recorded mortgage in Louisiana, since the mortgage was not recorded in Wilkinson County, Mississippi, at the time the property was attached, and the attaching creditor therefore, had no notice as provided in the statute, *supra.* How far the rule of comity might be applicable to such cases, where, for instance, an automobile is traveling from one state to another, we are not required to here decide; but we only hold that, where the property has been 'removed into this state,' and has a situs here the attaching creditor will prevail over the mortgagee in an unrecorded mortgage in the county where the levy is made."

Here, the court was controlled by a statute[18] which provided that mortgages, deeds of trust, etc., executed out of the state, should be

[17] 148 Miss. 219, 114 So. 322 (1927).

[18] Code of 1906, § 2797; Hemingway's Code, § 2298; Code of 1930, § 2149.

recorded before taking priority over creditors and *bona fide* purchasers within the state. The law applicable under the Louisiana system of jurisprudence was contrary to the public policy and statute law of the state of Mississippi, within *II B,* as above related. The decision might also be placed within classification *III,* above illustrated.[19]

In short, as the law stands in Mississippi today, the conditional vendor of an automobile in a sister state will be protected in Mississippi as against third parties; but the mortgagee in a sister state will not be so protected unless he takes care to have his mortgage recorded as required by law.

SIDNEY MAY.

[19] See *U. S. Fidelity & Guaranty Co.* v. *Northwest Engineering Co.,* 146 Miss. 476, 112 So. 580, 57 A. L. R. 530 (1927), where the reservation of title in an unrecorded conditional sale contract made in a state requiring recording was held good against an attachment in a state not requiring recording. This case would seem to follow classification *III.*

RECENT IMPORTANT DECISIONS

AUTOMOBILES—LIABILITY OF DRIVER TO SELF-INVITED GUEST.

At the request of plaintiff he was permitted to ride from Hattiesburg to New Orleans on a truck of defendant. While still in Louisiana on the return trip, the rocking bolster on which plaintiff was riding came loose as the truck rounded a sharp curve at the rate of 30 to 40 miles per hour and plaintiff was seriously injured. HELD: Judgment for plaintiff affirmed. A gratuitous guest is not a licensee even though he was not invited but was allowed to ride on his own request, and a driver must use ordinary care for his protection. *Green* v. *Maddox*, —— Miss. ——, 149 So. 882 (1933). Suggestion of error overruled, 151 So. 160.

The law as to a gratuitous guest in an automobile has three somewhat distinct divisions. Some courts follow the theory that the guest is a licensee, others, that he is more and that ordinary care is to be exercised in his behalf, and the third group of states have provided for the situation by statute law.

The general rule followed by most of the states and which is adopted in the above case is that where the guest is not guilty of contributory negligence, and the negligence of the driver or his agent is the proximate cause of the injury, the guest may recover damages, unless he was making the trip with the driver in a joint enterprise. Courts holding this theory do not impute the negligence of the driver to the guest, and he can demand more care than is required for the protection of a trespasser or licensee.[1] Courts holding to this theory distinctly differentiate this situation from that of a licensee on real property.[2] The analogy of the real property law is carried up to the point when the car is put in motion; then the law requires more care on the part of the driver or owner than while the car remained motionless. The reason for the deviation at this point seems to be based on the idea of dangerous instrumentality and the fact that the law has such a high regard for human life.[3] Ordinary care is required of the driver for the protection of the guest in states holding this theory.

Courts holding the theory that the guest is a mere licensee and can demand from the driver only a slight degree of care generally base their theory either on the law of bailment,[4] or on the real property law, which holds that one is only liable for adding a new danger to the ones already present, after the dis-

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[1] See cases cited in 5-6 HUDDY, CYCLOPEDIA OF AUTOMOBILE LAW (9th ed., 1931), § 130; 1 BLASHFIELD, CYCLOPEDIA OF AUTOMOBILE LAW (1927), 955, § 1; annotation 20 A. L. R. 1014, and supplementary annotations.

[2] *Munson* v. *Rupker* (Ind. App., 1925) 148 N. E. 169.

[3] "A guest at sufferance takes the car as he finds it but once it has been started the driver takes the guest's life in his hands and a different rule applies." *Munson* v. *Rupker, supra.*

[4] "Justice requires that one who undertakes to perform a duty gratuitously should not be under the same measure of obligation as one who enters upon the same obligation for pay." *Massaletti* v. *Fitzroy,* 228 Mass. 487, 118 N. W. 168 (1917). *Jacobson* v. *Stone,* 277 Mass. 323, 178 N. E. 636 (1931); *Cody* v. *Venzie,* 263 Pa. 541, 107 Atl. 383 (1919); *Saxe* v. *Terry,* 140 Wash. 503, 250 Pac. 27 (1926).

covery of the licensee on the property.[5] The driver is liable to the guest only because of gross negligence, which the courts define as being, "the slightest degree of care in any human relationship except that in the case of a trespasser."[6] If the injured person is considered a licensee, a declaration which does not charge the driver with wilfully injuring the guest does not state a cause of action.[7]

All of the statutes which have been passed in regard to the gratuitous guest have been in modification of this first theory of the common law on this subject. They have been passed because of the profuse litigation in this field, which has been brought about by liability insurance.[8] It does not matter whether the state has a statute on the subject or whether it follows either of the two theories of the common law; with each case are presented two questions: first, if the state recognizes degrees of negligence, whether or not the driver was guilty of gross negligence, and second, whether or not the one injured was a guest. It is with the problem of answering these two questions that the courts are confronted in the cases of gratuitous guests.

Dealing with the question of "gross negligence" first, we find that there are some states that do not accept this term and do not recognize degrees of negligence.[9] The modern tendency is to define negligence as the lack of proper care and to hold that the proof of negligence itself without regard to the degrees is all that is necessary to hold the driver liable.[10] There does not seem to be any well settled definition of "gross negligence" and each court seems to have a

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[5] *Sommerfield* v. *Flury et al.,* 198 Wis. 42, 223 N. W. 408 (1929); *O'Shea* v. *Lavoy,* 175 Wis. 456, 185 N. W. 525 (1921); *Harris* v. *Reid,* 30 Ga. App. 187, 117 S. E. 256 (1923).

[6] Cases cited in notes 4 and 5.

[7] *Crider* v. *Yolande Coal and Coke Co.,* 206 Ala. 271, 89 So. 285 (1921).

[8] The Connecticut statute is one of the first passed. Section 1 of this statute (Pub. Acts of Conn., 1927, ch. 308) provides: "No person transported by the owner or operator of a motor vehicle as his guest without payment for such transportation shall have a cause of action for damages against such owner or operator for injury, death or loss, in case of accident, unless such accident shall have been intentional on the part of said owner or operator or caused by his heedlessness or his reckless disregard of the rights of others." The statute in Michigan (Act No. 19, Pub. Acts, 1929, amended Act No. 302, Pub. Acts, 1915) uses the term "gross negligence" as descriptive of the negligence necessary to hold the driver liable. This is the term used by most of the statutes, and some of them add also, the intoxication of the driver. The following are examples: Iowa (Code of 1927, § 5026 b-1); Idaho (Session Laws, 1931, ch. 135, § 1) California (Statutes, 1923, § 141, p. 517, as added by Statutes, 1929, p. 1580); Oregon (Code of 1930, § 55-1209). A previous statute in Oregon, which took away all right of the guest to recover, even though the driver was wantonly negligent, was held unconstitutional in *Stewart* v. *Houk,* 127 Ore. 589, 271 Pac. 988, 61 A. L. R. 1236 (1928).

[9] 1 Thompson, Negligence (1901), 18 *et seq.* and cases cited therein. In an early decision the United States Supreme Court refused to recognize the degrees of negligence. *Steamboat New World* v. *King.,* 16 How. 469, 16 L. ed. 1019 (1853). The doctrine of degrees of negligence was introduced in the English law by Lord Holt in the famous case of *Coggs* v. *Bernard,* 2 Ld. Raym. 909 (1703), in which he enumerates the six kinds of bailments and the degrees of negligence necessary in each case to hold the bailee liable. But the doctrine did not go without opposition in England; in a much quoted opinion, *Wilson* v. *Brett,* 11 M. & W. 113 (1843), Baron Rolfe said, "I could see no difference between negligence and gross negligence—that it was the same thing with the addition of a vituperative epithet." Of course, it is easy to see that in states that do not recognize degrees of negligence proof of negligence is all that is necessary to hold the driver liable.

[10] *Railroad* v. *Lockwood,* 17 Wall. 357, 21 L. ed. 627 (1872).

definition peculiar to its jurisdiction.[11] In each case the question of negligence—whether it be called "gross negligence" or simply negligence—is a question for the jury and really solves itself in this way.[12] The difference between the theories followed by the several states is more verbal than real.[13]

There are two common defenses to the suits of a gratuitous guest whether under the common law or under statute—contributory negligence on the part of the guest and the assumption of the risk by him. It is not necessary that the negligence of the driver be the sole cause of the injury, but it is enough to hold him liable if his negligence is the proximate cause thereof.[14] One is held guilty of contributory negligence when he fails to warn the driver of impending dangers either from the manner of the driving or from extrinsic circumstances.[15] The guest cannot sit idly by and let harm come to himself but as a reasonable man must warn against dangers for his own protection.[16] A protest upon this holding of the law which charges the guest with the duty of keeping a lookout for his own protection came from no less a person than Benjamin Cardozo, who said, "I find it hard to imagine a rule more completely unrelated to the realities of life. Men situated as guests do not act in the way this rule expects and requires them to act. In the first place, they would in almost every case make the situation worse if they did; they would add bewilderment and confusion by contributing multitude of counsel. In the second place they rightly feel that, except in rare emergencies of danger known to them, but unknown to the driver, it is not their business to do anything."[17] This criticism is well taken and serves to bring out clearly the extent to which the courts are inclined to go in attempting to lessen the manifest hardship of holding a driver liable to a gratuitous guest under all circumstances.

The defense of assumption of risk has been gradually gaining favor in some courts, which hold that one who knows of the limited skill of the driver or of circumstances which would naturally tend to make him less efficient than otherwise and yet agrees to ride with him, has assumed the risk of such a ride.[18]

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[11] In construing the statutes on liability to a gratuitous guest several different definitions have become generally accepted in the various jurisdictions. Some courts hold that "gross negligence" is utter recklessness or deliberate disregard of the safety of others. *Starla* v. *Spokane, Portland and Seattle Trans. Co.,* 136 Ore. 315, 297 Pac. 367 (1931); *Franzoi* v. *Revenna et al.,* (Vt., 1933) 163 Atl. 564; *Sorrell* v. *White,* 103 Vt. 277, 153 Atl. 359 (1931). California has held that the failure to exercise slight care was "gross negligence." *Nelson et al.* v. *Westergaard et al.,* (Cal., 1933) 19 P. (2d) 867. Other states have also adopted this definition. *Ranch* v. *Stecklein* (Ore., 1933) 20 P. (2d) 387; *Morris* v. *Erskine* (Neb., 1933) 248 N. W. 96.

[12] *Gill et ux.* v. *Middleton,* 105 Mass. 477, 7 Am. Rep. 548 (1870).

[13] *Avery* v. *Thompson,* 117 Me. 120, 103 Atl. 4 (1918).

[14] 42 C. J. 887. It is well settled law in Michigan that the guest in a private vehicle, such as the wife (*Holsapel* v. *Sup't of the Poor,* 232 Mich. 603, 206 N. W. 529 [1925]), or any other gratuitous guest for pleasure not a minor (*June* v. *Grand Trunk Western Ry. Co.,* 232 Mich. 449, 205 N. W. 181 [1925]), is barred from recovery from a third person for injuries caused by such third person's negligence when the driver of the car in which the guest is riding is also negligent. The negligence of the driver is charged to the occupant. 16 *Notre Dame Lawyer,* 302 (1931).

[15] *Sheelsam* v. *Coffey,* 205 App. Div. 388, 200 N. Y. Supp. 55 (1923).

[16] *Harding* v. *Jessie,* 189 Wis. 652, 207 N. W. 708 (1926).

[17] "A Ministry of Justice," 35 *Harvard Law Review,* 113 at 121 (1921).

[18] *White* v. *McVicker* (Ia., 1933) 246 N. W. 385; *Olson* v. *Hermansen et al.,* 196 Wis. 614, 220 N. W. 203 (1928); *Kruger* v. *Kruger,* 197 Wis. 588, 222 N. W. 784 (1929); *Cleary* v. *Eckart,* 191 Wis. 114, 210 N. W. 267 (1926); *Garrow* v. *Seattle Taxicab Co.,* 135 Wash. 630, 238 Pac. 623, 45 A. L. R. 293 (1925).

Under almost the same set of facts, though, one court will hold the driver guilty of gross negligence and therefore liable and another will hold that the guest has assumed the risk and the driver is not liable.[19] It seems that the only way for a guest to avoid the assumption of risk in these states is for him to protest if the recklessness takes place after he had entered the car and he did not have previous knowledge of the driver's ability, though it does not appear that the driver must heed the protest.[20]

The question of who is a guest resolves itself mainly into the questions of whether there was a joint enterprise or not, and in some states whether the guest asked for the ride or was invited to ride. Under the majority rule, all persons who ride without paying for their transportation either tangible or intangible compensation are guests.[21] The guest is not held to be engaged in a joint enterprise with the driver if the relation of master and servant exists and the ride is to get the servant to work quicker or will enure to the benefit of the driver in any way.[22] In determining whether the guest was engaged in a joint enterprise or not the question is not only one of mutual benefit but also of the relationship of the parties.[23] There has been at least one decision holding that even in the case of joint enterprise the driver holds out to the rest of the company that they might hold him accountable for any damages to themselves caused by his negligence, the holding being based on the law of agency.[24] The test generally accepted to determine whether or not the guest is engaged in a joint enterprise or not is whether or not he has any control over the car.[25]

An invitation when accepted establishes the relation of guest and host and amounts to an express agreement.[26] The fact that the injured person was self-invited and was allowed to ride on his own request instead of being invited, is

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[19] When a guest was injured while riding in an automobile owned and operated by a son when it overturned when the son fell asleep while driving, because the parties had remained in the car the preceding night due to a breakdown, the guest assumed the risk and there was no actionable negligence of the son shown. *Kruger* v. *Kruger, supra* note 18.

Defendant had been driving for some time and planned to stop at the next town to get some coffee so that he might stay awake; he dozed off and collided with another car. Held: There was evidence from which the jury might find him guilty of reckless misconduct by driving when he was aware that he might fall asleep. *Potz* v. *Williams,* 113 Conn. 278, 155 Atl. 211 (1931).

[20] *Haines* v. *Duffy,* 206 Wis. 193, 204 N. W. 152 (1932); *Nyma* v. *Van Anrooy,* 260 Mich. 295, 244 N. W. 478 (1932).

[21] *Smith* v. *Laflor,* 137 Ore. 230, 2 P. (2d) 18 (1931); *Crawford* v. *Foster,* 63 Cal. App. 1149, 293 Pac. 842 (1930); *Brookart* v. *Greenlease-Lied Motor Co.* (Ia., 1932) 244 N. W. 721; *Kruy* v. *Smith,* 108 Conn. 628, 144 Atl. 304 (1929); *Reelving* v. *Moncreavie,* (Calif., 1933) 21 P. (2d) 986; *Russell* v. *Parlee,* (Conn., 1932) 163 Atl. 404; *Knutson* v. *Lurie,* (Ia., 1933) 251 N. W. 147; 18 *Iowa Law Review,* 358 (1933).

[22] *Knutson* v. *Lurie, supra* note 21.

[23] *Kruy* v. *Smith et ux.,* 108 Conn. 628, 144 Atl. 304 (1929). A prospective purchaser who rides in a car to test it is not a guest within the meaning of the statute of California (*Crawford* v. *Foster,* 63 Cal. App. 1149, 293 Pac. 842 [1930]), or of Iowa (*Greenlease-Lied Moter Co., supra* note 21; 18 *Iowa Law Review,* 395), or of Michigan (*Morgan* v. *Taruargean,* [Mich., 1932] 244 N. W. 173), or of Connecticut (*Kruy* v. *Smith, supra*). A guest is one who confers no benefit upon the driver except that of his company. *Crawford* v. *Foster, supra.*

[24] *Bushwell* v. *Bushwell,* 103 Conn. 583, 131 Atl. 432 (1925).

[25] *Donald* v. *Long Beach Coal Co.,* 86 W. Va. 249, 103 S. E. 55 (1920); *Matthews* v. *B. & O. Ry. Co.,* 208 Pa. 238, 162 Atl. 221 (1932).

[26] *Wurtzburger* v. *Oglesby,* 222 Ala. 75, 131 So. 9 (1930)

generally held to make no difference in the liability of the driver to him.[27] There are cases, however, taking exception to this rule and holding that one who solicits a ride is a mere licensee.[28] Massachusetts has held that the fact that a child was accustomed to riding on a milk wagon for some distance past her home, with the knowledge of the driver did not amount to an implied invitation to her to ride and that she was not a guest but a mere licensee.[29]

Even though Mississippi has apparently brought herself within the generally accepted theory of the liability of driver to a self-invited guest it must be kept in mind that the law of Louisiana was controlling in the case under discussion.[30] The court also cited Mississippi cases in substantiating its opinion but none of the cases cited bear directly on the points involved in the case. It seems that the court would have done well, in the face of the decided trend both through direct legislation and the judicial devices of contributory negligence, assumption of risk and joint enterprise to hold the driver less strictly than at common law, not to have committed itself as it did on the law in Mississippi. The increase in the number of automobiles and of the so-called "hitch-hikers" has made the problem of the gratuitous guest more acute within recent years; and, as has been shown, this acuteness has reflected itself in many of the states in the form of statutes lessening the burden placed on the sympathetic driver. It is possible to ameliorate the situation to a great extent without the aid of legislation by holding to the distinction which the New Jersey Court makes in holding the person being carried a licensee when he asks for the ride and a guest when he is invited. This distinction does not do away entirely with the common-law liability of the driver to his guest and yet at the same time relieves the driver of an onerous liability when he merely accedes to the request of one that he be taken along on the journey.

JOHN E. STONE.

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[27] *Black* v. *Goldweber,* 172 Ark. 862, 291 S. W. 76 (1927); *Grabau* v. *Pudwell et al.,* 45 N. D. 423, 178 N. W. 124 (1920); *Munson* v. *Rupker, supra* note 2; *La Rose* v. *Shaughnessy Ice Co.,* 197 App. Div. 821, 189 N. Y. Supp. 562 (1921); *Holdhusen* v. *Schaible* (S. D., 1932) 244 N. W. 392; *Robinson* v. *Leonard,* 100 Vt. 1, 134 Atl. 705 (1926); *McAndrews* v. *Leonard,* 99 Vt. 512, 134 Atl. 719 (1926); *Marple* v. *Haddad,* 103 W. Va. 508, 138 S. E. 113, 61 A. L. R. 1248 (1927); *Mitchell* v. *Raymond,* 181 Wis. 591, 195 N. W. 855; *Chanson* v. *Morgan's La. & T. R. & S. S. Co.,* (La. App., 1931) 136 So. 647, the court basing its decision on the definition of an automobile guest in FUNK & WAGNALL'S STANDARD PRACTICAL DICTIONARY, and the comment therein that the term "is applied with little respect to the duration of the call or WHETHER THE PERSON BE PRESENT BY INVITATION OR NOT." (Capitals used by the court).

[28] *Lutin* v. *Dupus,* 94 N. J. L. 64, 108 Atl. 862; *Foggioni et al.* v. *Weis,* 99 N. J. L. 157, 122 Atl. 840. Numerous subsequent New Jersey cases are in accord.

Until recently, this distinction was also made in Alabama. See *Reed* v. *Rideout's Ambulance, Inc.,* 212 Ala. 428, 102 So. 906 (1925); and *Crider* v. *Yolande Coal & Coke Co., supra* note 7. These cases appear to have been overruled, however, by *Wurtzburger* v. *Oglesby, supra* note 26.

[29] *West* v. *Poor,* 196 Mass. 183, 81 N. E. 900 (1907).

[30] It will be recalled that the injury was sustained in Louisiana, and the law of that state will therefore apply. Louisiana cases lay down the rule that a driver is liable for ordinary care to even a guest at sufferance. *Chanson* v. *Morgan's La. & T. R. & S. S. Co., supra* note 27; *Barber* v. *El Dorado Lbr. Co.,* (La. App., 1932) 139 So. 29. For this reason, therefore, the actual decision in the instant case is not open to question.

BILLS AND NOTES—PAYEE'S NAME LEFT BLANK—SUBSEQUENT PURCHASER FOR VALUE NOT HOLDER IN DUE COURSE.

Defendant signed and delivered notes to A, reading, "Pay to order of ———", the rate of interest and the interest dates being also left blank. A subsequently negotiated the notes to plaintiff for full value. Plaintiff brings this action on the incomplete instruments, and defendant pleads failure of consideration. HELD: There was lack of a specific payee, and plaintiff was not a holder in due course. *Moore* v. *Vaughn et al.*, —— Miss. ——, 150 So. 372 (1933).

The Negotiable Instrument Law,[1] as well as the Bills of Exchange Act of England[2], provides that "where an instrument is payable to order, the payee must be named or indicated therein with reasonable certainty".[3] But in certain instances the payee may be designated by implication,[4] or even by description.[5] When the note is drawn payable to order, with the space for the payee's name left blank and negotiated in that form, any person who comes by it regularly can no longer fill up the blank and recover thereon.[6] This limitation was brought about because of the change made by section 8 of the Negotiable Instrument Law. Formerly, under the unwritten Law of Merchants, where an instrument was issued leaving the space for payee's name in blank, any holder was impliedly given authority to fill the blank by inserting his own name, or that of his vendor.[7]

The interpretations, by the courts, of section 9 of the Negotiable Instrument Law, which provides that the instrument must be payable to order or to bearer,[8]

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[1] Adopted in Mississippi in 1916.

[2] Our Negotiable Instrument Law is based largely upon the English Bills of Exchange Act.

[3] N. I. L., § 8. There is a slight variation in the B. E. A.: "When the bill is not payable to bearer, the payee must be named or otherwise indicated therein with reasonable certainty." B. E. A., § 7(1). See NORTON, BILLS AND NOTES, (4th ed.) §§ 26-30 (1914).

[4] "In case of ambiguity or uncertainty as to a party attempted to be expressed or designated, then, as in all cases of written contracts and their construction, extrinsic evidence is admissible to show who was intended." 3 R. C. L. § 63, p. 878.

[5] "As to the identity of the payee, it is sufficient if the note discloses from whom the consideration was received." *Kessler* v. *Clayes,* 147 Mo. App. 88, 125 S. W. 799 (1910). 8 C. J. § 288, p. 171; 3 R. C. L. § 62, p. 877.

[6] BRANNAN, NEGOTIABLE INSTRUMENT LAW, ANNOTATED (5th ed., Beutel) § 9, p. 170 (1932). "The rule is, with certain exceptions, that in instruments for the payment of money, if no one be designed as payee, either by name or as bearer, the instrument is not a promissory note." *Smith* v. *Willing,* 123 Wis. 377, 101 N. W. 692, 68 L. R. A. 940 (1904). *Tower* v. *Stanley,* 220 Mass. 429, 107 N. E. 1010 (1915).

[7] In an early Illinois case, *Rich* v. *Starbuck,* 57 Ill. 87 (1875), where a check read, "to the order of ———" the court held that "an action by the person to whom a bill with a blank for the name of the payee had been delivered may be maintained upon proof of the delivery and ownership of the bill." *Hardin* v. *State,* 54 Ind. 359 (1876), announces the same principle. In *Tower* v. *Stanley, supra,* by way of *dictum* the court said, "The maker having put his commercial paper in circulation, is estopped to set up the defect and a holder in good faith and for value is deemed to have been given implied authority to fill the blanks with appropriate terms." See BIGELOW, BILLS, NOTES & CHECKS, (3rd ed., Lile) § 158, p. 102 (1928); 1 DANIEL, NEGOTIABLE INSTRUMENTS, (7th ed., Calvert) §§ 159-162, pp. 192-199 (1933).

[8] "The instrument is payable to bearer . . . (2) When it is payable to a person named therein or bearer; or (3) When it is payable to the order of a fictitious or non-existing person, and such fact was known to the person making it so payable; or (4) When the name of the payee does not purport to be the name of any person . . ." N. I. L., § 9.

are in no little confusion. An instrument need not be drawn payable to a named individual, but will be considered as payable to "bearer" generally, the mentioning of an impersonal payee making an indorsement by the payee impossible, indicating an intention that it will be negotiable without indorsement, or, in other words, that it will be payable to bearer.[9] Thus, in some jurisdictions, the mere omission to insert in the instrument the name of a payee is not such a defect as will effect its negotiability. In the English case of *Chamberlain* v. *Young*,[10] the words "pay to ——— order" were construed as meaning "pay to my order," in effect making it payable to bearer. But in the case of *Gordon* v. *Lansing State Saving Bank*,[11] the Supreme Court of Michigan, in construing the words "pay to the order of ———," (a line being drawn through the blank space), said that the check was void for want of a payee. At first blush the case would appear *contra* to *Chamberlain* v. *Young*, but they are to be distinguished by the holding of Moore, J., who said, that "not only did Mr. Gordon fail to insert the name of a payee, or to leave a blank where the name of the payee might be inserted, but he did more. He drew a line through the blank space, making it impossible for anyone else to insert therein a name, indicating very clearly that he not only declined to name a payee, but intended to make it impossible for anyone to do so." From this holding it might be inferred that had the line not been drawn through the blank space, the absence of a designated payee would not have invalidated the instrument.[12] But neither of the cases is to be considered binding authority in the United States today, one being decided under the Bills of Exchange Act of England, and the other in a state which had not yet adopted the Uniform Negotiable Instrument Law.[13]

As before stated, an instrument is payable to bearer when made payable to a fictitious or nonexisting person, such fact being known to the maker;[14] or when the name does not purport to be the name of any particular person.[15] When, however, the blank is left by the maker it must be filled in before, or at the time of negotiation, in order to be negotiable and to hold the maker liable to all parties prior to its completion,[16] and it must be completed in accordance with the authority given, and within a reasonable time.[17] The failure to complete the

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[9] It is very often the case that such notes are executed leaving name for the payee left blank, the purpose being that owner can pass title to such paper by delivery. See *Elliott* v. *Deason,* 64 Ga. 63 (1879); *Steel* v. *Rathburn,* 42 Fed. (Ore.) 390 (1890); *Finley* v. *Rose,* 189 Ky. 359, 224 S. W. 1059 (1920). Also, *McIntosh* v. *Lytle,* 26 Minn. 336, 3 N. W. 983, 37 Am. Rep. 410 (1880). 1 DANIEL, *op. cit.,* § 157, p. 188; *ibid.,* No. 160, p. 196.

[10] 2 Q. B. 206 (1893).

[11] 133 Mich. 143, 94 N. W. 741 (1903).

[12] Michigan at this time had not adopted the N. I. L., but its influence clearly plays an important part in this decision.

[13] Michigan adopted the N. I. L., June 16, 1905.

[14] N. I. L., § 9(3). When a note is knowingly made payable to the order of a fictitious person, it is in effect payable to bearer, and may be negotiated by delivery only. *Atlanta & Lowry National Bank* v. *First National Bank of Carrollton,* 145 S. E. (Ga.) 521 (1928). See BRANNAN, *op. cit.,* § 9 (3), pp. 172-192.

[15] N. I. L., § 9(4).

[16] Some courts have held that it was necessary for the holder to complete the instrument in order to establish privity of contract between holder and maker. See *Thompson* v. *Rathburn,* 18 Ore. 202, 22 Pac. 837 (1889); *Seavy* v. *Bank of Tennessee,* 3 Sneed. (Tenn.) 568 (1856).

[17] "In order, however, that any such instrument when completed may be enforced against any person who became a party thereto prior to its completion, it must be filled up strictly in accordance with the authority given and within a reasonable time." N. I. L., § 14.

instrument by filling in the blanks, as indicated under section 14 of Negotiable Instrument Law, leaves the paper subject to all personal defenses that might arise between the original parties.[18]

The completion of the instrument is necessary, because, on presentation for payment the holder must prove himself to be a holder in due course.[19] He must prove that when he received the instrument it was complete and regular upon its face[20] and that he had no notice of any infirmities therein, or lack of good title in the person who negotiated it to him.[21] The purchaser of a negotiable instrument with unfilled blanks is put on notice and inquiry as to the authority of the person intrusted with such an incomplete instrument.[22] This point is well taken in a Texas case, *American Express Co.* v. *City National Bank of Galveston,*[23] where the plaintiff bank attempted to recover on incomplete travellers' checks which had been stolen from the express company. The court said, "The plaintiff bank is not entitled to and ought not to recover against defendant express company, because the bank is not a holder in due course of these checks, because, at time of cashing . . . there was no payee named in the checks in the blank space for the name of the payee, and because the instruments were in form payable to order, and were and have not been transferred to plaintiff by indorsement . . ." It further indicated that no amount of good faith in the purchaser could validate an instrument not complete or regular upon its face.[24] Also in the Mass. case of *Tower* v. *Stanley,*[25] the court said, "It is plain that the defendant while a holder for value, is not a holder in due course and having purchased [notes] with notice upon their face that when delivered by the maker they were in an inchoate state, he was put upon inquiry as to the authority to negotiate."[26]

Also, in order to be considered a holder in due course, the plaintiff must show that he purchased the note in good faith,[27] It is hardly plausible that one could

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[18] "This provision is generally regarded as having changed the law, and the rule that the maker is liable to a *bona fide* holder in due course for value . . . does not apply to one who becomes a party prior to its completion." 1 DANIEL, *op. cit.,* § 159, p. 195.

Equitable Trust Co. v. *Lyons,* 72 Misc. Rep. 49, 129 N. Y. Supp. 79 (1911); BIGELOW, *op. cit.,* § 523, p. 414. N. I. L., § 58 provides that "In the hands of any holder other than a holder in due course, a negotiable instrument is subject to same defenses as if it were non-negotiable."

[19] N. I. L., §§ 52, 59. See Horigan, "Proof of Good Faith," 25 *Mich. L. Rev.* 870 (1925).

[20] N. I. L., § 52(1).

[21] N. I. L., § 52(4). Also § 56. 8 C. J. § 692, p. 475. For necessity of knowledge of defect see *Cook* v. *Derewicz,* 102 Pa. Supp. 565, 157 S. W. 360 (1931).

[22] *Tower* v. *Stanley, supra; Harrington National Bank* v. *Breslin,* 88 Neb. 47, 128 N. W. 659, 31 L. R. A. (N. S.) 639, Ann. Cas. 1912B, 1008 (1910).

[23] (Tex. Civ. App.), 7. S. W. (2d) 886 (1928).

[24] Citing *Cherbonnier* v. *Bank,* (Tex. Civ. App.), 199 S. W. 307 (1917); *Commercial Security Co.* v. *Hull,* (Tex. Civ. App.), 212 S. W. 986 (1919); *Linich* v. *Nutting,* 140 App. Div. 265, 125 N. Y. S. 93 (1910); *Purviance* v. *Jones,* 120 Ind. 162, 21 N. E. 1099, 16 Am. St. Rep. 319 (1889). 8 C. J. § 338, p. 208.

[25] *Supra,* note 6.

[26] *Munroe* v. *Stanley,* 220 Mass. 438, 107 N. E. 1012 (1915). In the case of *Stone* v. *Sargent,* 220 Mass. 445, 107 N. E. 1014 (1915), where the payee's name was left blank, on the question of notice, the court said, "the defendant [is] chargeable with notice that the instrument was not completed in accordance with authority, since it was not completed at all."

[27] For further reading on this point see, G. W. Rightmire, "The Doctrine of

purchase an instrument, with the name of payee and other blanks left unfilled, and still assume the status of a purchaser in good faith.[28] Blank spaces in an instrument are indicators of latent dangers to all potential purchasers of negotiable paper. A total disregard of these warnings is strong evidence of bad faith.[29]

Before the passage of the Negotiable Instrument Law some speculation might have been made as to what the status of this holder would have been had he himself completed the instrument by filling in the blank space with his name or the name of his transferor,[30] but under section 14 of the Negotiable Instrument Law only parties who are holders in due course subsequent to the completion of the instrument are protected.[31] By accepting an instrument containing blanks the holder acts at his peril, since the statute makes him a holder of bearer paper only in a very limited sense, and does not give him the rights of a holder in due course.[32]

The instrument is none the less negotiable because a blank space is left for the rate of interest, as the law then implies the legal rate.[33] Where the date, from

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Bad Faith in the Negotiable Instrument Law," 18 *Mich. L. Rev.* 355 (1920). Also *Manussier* v. *Wright,* 158 Ill. App. 214 (1910), and cases cited.

[28] ". . . the taking of an instrument under circumstances so strongly and decisively suggesting notice of an equity or defect of title that no reasonable conclusion can be drawn than that the plaintiff deliberately turned away from inquiry and closed his eyes for every purpose of avoiding discovery of the truth, is in itself an act of bad faith and will be so treated." Bigelow, *op. cit.,* § 474, p. 366.

[29] Bigelow, *op. cit.,* § 476, p. 367. As to a rule requiring actual knowledge or bad faith on part of plaintiff, see, *Davidson* v. *Falls,* 215 Ky. 368, 285 S. W. 209 (1926).

[30] "Prior to the passage of the N. I. L. it was open to question in the United States whether a purchaser in good faith or an incomplete instrument might recover if he filled out the note in accordance with the statement of authority made by the person from whom he bought the instrument even though such statement were false. There is no doubt, however, now, that the purchaser must find at his peril the authority of the person in possession of the incomplete instrument." 2 Williston, Contracts, § 1141, p. 2117 (1927). *Vander Ploez* v. *Van Zunk,* 135 Iowa, 350, 112 N. W. 236, 13 L. R. A. (N. S.) 490, 124 Am. St. Rep. 275 (1907); *Harrington National Bank* v. *Breslin, supra; Stone* v. *Sargent, supra.*

[31] "The statutory rule seems sound, for there is not sufficient reason for encouraging the circulation of incomplete commercial paper to make it desirable to protect even an innocent purchaser for value who knows of the blanks." Brannan, *op. cit.,* § 14, p. 209. "By the very fact of the unfilled blanks the purchaser is put on notice of the agency of and its possible (if not probable) limitations, and therefore purchases the instrument at his peril." Bigelow, *op. cit.,* § 523, p. 415. *Hannen* v. *Peoples State Bank,* 195 Ky. 58, 241 S. W. 355 (1922); *Boston Steel & Iron Co.* v. *Steur,* 183 Mass. 140, 66 N. E. 646, 97 Am. St. Rep. 426 (1903); *Brown* v. *Thomas,* 120 Va. 763, 92 S. E. 977 (1917). But, "if the instrument is completed though fraudulently and without authority, the statute makes it clear that a holder in due course may recover." 2 Williston, *op. cit.,* § 1141, p. 2117. See *Johnston* v. *Knipe,* 260 Pa. 504, 103 Atl. 957 (1918).

[32] "If the name of the payee is not filled in within a reasonable time, this does not effect the right of a court of equity to reform the writing to make it speak the true intent and purpose of the parties as it existed at the time the instrument was delivered." *Farmers' Loan Co.* v. *Brown,* 182 Iowa, 1044, 165 N. W. 70 (1917).

[33] "If a blank be left for the rate of interest, it does not imply authority to fill in a rate greater than the legal rate, and the party doing this would commit a material alteration." *Franklin National Bank* v. *Roberts Brothers,* 168 N. C.

which the interest is to run, is omitted, the statute says, "the interest runs from the date of the instrument, and if the instrument is undated, from the issue thereof."[34]

EARL VANDORN CATOE, JR.

CRIMINAL LAW—ROBBERY—ANIMUS FURANDI—FORCIBLE TAKING OF PROPERTY AS SECURITY FOR AN ALLEGED CLAIM.

Defendant had a dog which sucked eggs on the premises of one Minyard, the complaining witness, who shot and killed it. Defendant confronted the unarmed Minyard with a shotgun and commanded that he hand over $20.00 as damages for killing the dog. When Minyard could not produce the money, defendant took his cow to hold until the money should be paid. HELD: Defendant was guilty of robbery. *Thomas* v. *State,* 165 Miss. 897, 148 So. 225 (1933).

When an individual takes property which he *bona fide* believes to be his own, the cases seem to be generally agreed that he is not guilty of robbery.[1] When the property is taken to compel the payment of a debt, however, the authorities are more in conflict, some courts holding that robbery had been committed and others that because of the lack of *animus furandi* there is no robbery.

In the instant case, the court relies strongly on the case of *Fannin* v. *State*[2] to uphold its position that robbery had been committed. This Texas court says: "No man has the right, as we understand the law, to take the law in his own hands, and at the point of a six-shooter, putting his debtor in fear of his life or serious bodily injury, collect a debt, however just, and then defend against it, on the ground that the property was not fraudulently taken because the appellant owed him the money and would not pay him. This is more than a simple trespass, and it will be a dangerous doctrine to hold that a man can thus collect his debts."

Reliance is also placed on the reasoning of the Oklahoma case of *Tipton* v. *State,*[3] which says: "The taking of something of value from another, by means of force or fear of injury, is the gist of the offense of robbery; whether the motives leading up to the assault grew out of avarice, revenge, or curiosity is immaterial. None of these motives would justify robbery, or change the degree of the offense."

The two cases quoted above are the only cases cited by the court in substantiation of its holding. The court points out, however, that there is a contrary view taken on the subject, and cites cases holding to this view.

A recent case in accord with the decision in the instant case was decided by

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473, 84 S. E. 706 (1915). See also, *Merchants National Bank* v. *Brastrup,* 39 N. D. 619, 168 N. W. 42 (1918).

[34] N. I. L., § 17(2).

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[1] *Littlejohn* v. *State,* 59 Miss. 273 (1881); *Hamilton* v. *State,* 111 Miss. 779, 72 So. 198 (1916); *Brown* v. *State,* 28 Ark. 126 (1873); *Johnson* v. *State,* 24 Okla. Cr. Rep. 326, 218 Pac. 179 (1923); *People* v. *Sheasbey,* 82 Cal. App. 459, 255 Pac. 836 (1927); *Analytis* v. *People,* 68 Colo. 74, 188 Pac. 1113 (1920); *Triplett* v. *Commonwealth,* 122 Ky. 35, 91 S. W. 281 (1906); 2 WHARTON, CRIMINAL LAW (11th ed., 1912) 1297, § 1088.

[2] 51 Tex. Cr. Rep. 41, 100 S. W. 916, 10 L. R. A. (NS) 744, 123 Am. St. Rep. 874 (1907).

[3] 23 Okla. Cr. Rep. 86, 212 Pac. 612, 31 A. L. R. 1074 (1923).

the Criminal Court of Appeals of Oklahoma in 1931 and held that the forcible taking of property to collect unliquidated damages for compensation for alleged misconduct with the taker's wife constituted "robbery."[4]

The court in the instant case failed to take cognizance of the fact that the case of *Fannin* v *State* has been overruled in Texas by the case of *Barton* v. *State*,[5] which held that if the defendant, acting under a *bona fide* belief and claim that money was owed to him, and for the sole purpose of obtaining the money and applying it upon the debt due, made an assault or threats, he would not necessarily be guilty of robbery. Whether or not his taking or claim was made in good faith or as a pretext to cover fraudulent intent was a question for the jury.

Another case upholding the doctrine different to the one in the instant case is that of *Butts* v. *Commonwealth*,[6] which declares that even though the defendant took money with the intent to deprive another of his property, it was not with dishonest or criminal intent, for although he took an unlawful means of collecting his debt, he was guilty of an aggravated assault, but not robbery. "There can be no *animus furandi*, or criminal intent, where the property is taken under a *bona fide* claim of right." The court in this case states that some states have even gone further and hold that the taking of chattels openly and avowedly as a security for a debt is not larceny. It cites among other cases, the Mississippi case of *Buchanan* v. *State*.[7]

A case very definitely holding that the defendant is not guilty of robbery is that of *State* v. *Holloway*,[8] which says: "In robbery, as in larceny, it is essential that the taking of the goods be *animo furandi*. Unless the taking be with felonious intent it is not robbery. If a man, under a *bona fide* belief that the property is his own, obtain it by menaces, that is a trespass, but no robbery . . . There is no fraud or injury intended . . . The intent . . . is to obtain that which he believes to be his own and nothing more. This rebuts the inference of a felonious intent that would arise from the forcible and unlawful taking."

This view appears to be adopted by the majority of the courts, and is believed to be the sounder one.[9]

The instant case is differentiated from those cited because of the fact that there was not here a liquidated debt or damages. Should the fact that the damages are unliquidated make any difference in the holding? It is clear, of course,

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[4] *Kinsey* v. *State* (Okla. Cr., 1931) 296 Pac. 1002. See, also, in accord: *Holland* v. *State*, 8 Ga. App. 202, 68 S. E. 861 (1910); note, 135 Am. St. Rep. 487 (1909). Accord as to larceny: *McKenzie* v. *State*, 8 Ga. App. 124, 68 S. E. 622 (1910); *Gettinger* v. *State*, 13 Neb. 308, 14 N. W. 403 (1882).

[5] 88 Tex. Cr. Rep. 368, 227 S. E. 317, 13 A. L. R. 147 (1921).

[6] 145 Va. 800, 133 S. E. 764 (1911).

[7] 5 So. 617 (Miss., not off. rep., 1889). This case does not entirely substantiate the statement for which it is cited as authority.

[8] 41 Ia. 200, 20 Am. Rep. 586 (1875).

[9] *Crawford* v. *State*, 90 Ga. 701, 17 S. E. 628, 35 Am. St. Rep. 242 (1893); *State*. v. *Brown*, 104 Mo. 365, 16 S. W. 406 (1891); *State* v. *Carroll*, 160 Mo. 368, 60 S. W. 1087 (1901); *State* v. *Culpepper*, 293 Mo. 249, 238 S. W. 801 (1922); *Regina* v. *Hemmings*, 4 Fost. & F. 50, 176 Eng. Rep. 462 (1864); 2 Bishop, Criminal Law (9th ed., 1923) 863, §1162(3); 2 Russell, Crimes (9th Am. ed., 1877) *104. See also, *McDaniel* v. *State*, 8 S. & M. (Miss.) 401, 47 Am. Dec. 93 (1874); *State* v. *Carmans*, Tappan (Ohio) 65 (1816); *People* v. *Hughes*, 11 Utah, 100, 39 Pac. 492 (1895).

In accord as to larceny: *Commonwealth* v *Stebbins*, 8 Gray (Mass.) 492 (1857); 2 Bishop, *op. cit.*, 647, § 849; 2 Wharton, *op cit.*, 1346, § 1122, and cases cited.

that the collection of unliquidated damages by force is more reprehensible than the collection of liquidated debts or damages by force, because in the former case the taker puts upon himself the burden of saying what and how much his damages and recovery should be.

In *Tipton* v. *State*[10] the distinction between liquidated and unliquidated damages is clearly made, the court arguing that to hold that the collection of unliquidated damages is not robbery would be "an invitation to aggrieved persons to assume the functions of judge, jury and sheriff to violently and forcibly compensate themselves for the injury or assumed injury inflicted, to any extent deemed adequate by the aggrieved person alone, and that such violence would amount to no more than a mere trespass or simple assault."[11]

It does seem that a person has no right to liquidate his debts or damages at the point of a gun, for the taker, incensed by his own passions and prejudices is not a competent judge of the damage that he has suffered. In either case, however, it appears that the essential element of *animus furandi* is lacking, because the taking is done under a *bona fide* belief that the taker is entitled to his debt or to damages.

In the instant case, there is also the fact that the defendant took the property of the complaining witness merely as security to hold until the amount of damages which he believed were fair should be paid. This fact might be seized upon as an indication that the cow was taken *animo furandi,* since it could be pointed out that the defendant knew that the cow did not belong to him. On the other hand, however, it is still true that the defendant believed that he was entitled to compensation for the killing of his dog and that he took the cow merely to hold as a pledge for the payment of that compensation; the taking was under a *bona fide* claim of right to take, and not *animo furandi.*[12] The fact that the defendant probably could not have recovered damages in a law court[13] does not appear to be material, since he still believed that he was entitled to compensation.

The evidence in the instant case hardly seems to support the conviction of

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[10] *Supra,* note 3.

[11] The holding in this case is followed in *Kinsey* v. *State, supra* note 4. There appear to be no other cases discussing the exact point.

[12] This reasoning seems to be substantiated by *People* v. *Hall,* 6 Parker Cr. Rep. (N. Y.) 642 (1864). See also *State* v. *Hollyway, supra,* note 8; and *Butts* v. *Commonwealth, supra,* note 6. The language of some of the other cases previously cited is broad enough to cover the situation involved here.

Cf. Greene v. *Fankhauser,* 137 App. Div. 124, 121 N. Y. Supp. 1004 (1910), where an automobile was taken from a street by the proprietor of a garage without authority of the owner to enforce payment of a claim due from him, and it was held that this amounted to larceny. This decision, however, was controlled by a statute which stated that one "who, with the intent to deprive or defraud the true owner of his property, or of the use and benefit thereof, or to appropriate the same to the use of the taker, or any other person," is guilty of larceny. The action of the defendant in that case was certainly "with the intent to deprive . . . the true owner of his property," and the decision would not be authority outside the state of New York. The Mississippi statute on robbery does not provide a solution for the question, but merely provides: "Every person who shall *feloniously* take the personal property of another . . . shall be guilty of robbery." Miss. Code Ann., 1930, § 1126. (Italics are the writer's).

[13] The court in the instant case says that "There is serious doubt as to Minyard's civil liability for the killing of the dog;" and he was not guilty of malicious mischief in the killing of the dog. *Ainsworth* v. *State* (Miss., 1933) 147 So. 815; *Stevens* v. *State,* 65 Miss. 329, 3 So. 458 (1887); *Griffy* v. *State,* 118 Miss. 64, 79 So. 3 (1918).

robbery; for that essential and indispensable element—the intent to steal—does not appear to be present. As the case affirmed the conviction in the lower court, the jury may have found that the taking of the cow was done *animo furandi.* There is no mention, however, of the instructions that were given to the jury, nor is the effect of the verdict discussed. It is the peculiar province of the jury, under proper instructions from the court, to decide whether or not the taking is done with the intent to steal.[14]

There is no doubt that the defendant attempted to take the law in his own hands in this case, and no court would hold that a person had a right to collect his debts by force or intimidation, or to use his shotgun as a "liquidator" for his unliquidated debts or damages, for such a policy would lead to untoward practices. Clearly, the defendant was guilty of at least an aggravated assault, and the complaining witness would also have a right to bring against him a civil action for damages. But it is submitted that the defendant was not guilty of robbery because he apparently honestly believed that he had a right to damages for the killing of his dog, and it does not seem that the taking was done *animo furandi.*

BILLY BACON.

EQUITY—JURISDICTION TO ENJOIN MULTIPLICITY OF SUITS AT LAW ON SOLE GROUND OF COMMUNITY OF INTEREST IN QUESTIONS OF LAW AND FACT INVOLVED.

Several owners of property situated near a power company's transformer substation brought separate actions at law to recover damages resulting from the noise, vibration and explosions of balls of fire from the station. The power company thereupon filed a bill in chancery court to enjoin the prosecution of the several suits at law and to settle the whole controversy at one time in the equity court. HELD: Injunction denied. *Miss. Power. Co.* v. *Ballard et al.,* 166 Miss. 631, 146 So. 874 (1933).

The court based its decision upon the doctrine laid down in the leading case of *Tribette* v. *I. C. R. Co.*[1] that there must be some recognized ground of equitable interference, or some community of interest in the subject matter of the controversy, or a common right or title involved, to warrant a joinder of all in one action; or there must be some common purpose in pursuit of a common adversary, where each may resort to equity. It is considered, under this rule, that a community of interest in questions of law and fact involved is alone insufficient to confer jurisdiction on the equity court.

In the principal case the power company contended that the injury for which the suits at law were brought, was continuous in its nature, and that the case would not be governed by the limitation of the Tribette case. The court, admitting the principle that in the case of a continuing injury, equity would take jurisdiction, said the question was not involved here because the property owners had not each brought successive actions at law. The court intimated, although expressly reserving the point, that any future suit at law by any one of the property owners could be met by a plea of *res adjudicata,* after the issues were once settled in the law court.

A few years after the Tribette case was decided, the doctrine announced therein

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[14] *Johnson* v. *State, supra,* note 1; *Barton* v. *State, supra,* note 5; *State* v. *Hollyway, supra,* note 8; *Crawford* v. *State, supra,* note 9.

[1] 70 Miss. 182, 12 So. 32, 35 Am. St. Rep. 642, 19 L. R. A. 660 (1892).

was repudiated in a subsequent case.[2] The rule announced by Pomeroy,[3] that merely a community of interest in questions of law and fact involved is sufficient to give equity jurisdiction, was followed in this case. Still later the court returned to the rule established by the Tribette case,[4] and it has not been questioned since that time as the law of this state.

There is a minority view following the rule stated by Pomeroy.[5] The reason given is that equity will take jurisdiction to prevent a multiplicity of suits; that jurisdiction of equity is exercised, not only because there are many suits, but also because all the suits may be determined by the same principles of law and by proof of the same facts. Consequently, it has been held that equity has jurisdiction to prevent a multiplicity of suits in favor of a tortfeasor against whom several actions at law have been instituted by separate individuals to recover damages for injuries resulting from a single tort, even where there is no other equity in the case.[6]

In support of the "Tribette doctrine" it is argued that jurisdiction of equity to prevent a multiplicity of suits should not be exercised merely to lessen the labors of the court to which an appeal is made. The fact that there may be a community of interest among the defendants (in the equity court) in questions of law and fact does not, it is contended, give to the person they are pursuing any equity in himself on which he may have an injunction restraining prosecution of the suits at law. It is pointed out that there must be a limitation upon application of the minority view, and that such limitation can be arrived at only by an arbitrary method.[7]

The "Tribette rule" does not prevent the exercise of equitable jurisdiction in cases in which equity has long been accustomed to interfere. Where there is an equitable ground of interference in the subject matter—as for example, the case of a continuing injury[8]—equity will not hesitate to enjoin prosecution of successive actions at law and decide the whole matter at one time in the equity court. Here, there is an equity existing aside from the community of interests in questions of law and fact involved among the litigants.[9]

The rule followed in the principal case is founded on a distinction between the two systems of jurisprudence—law and equity. In recent years, not only the courts, but also the systems to a limited degree, have been merged to such an extent that both legal and equitable relief may be given at the same time. The same court may sit as both a law and an equity court simultaneously. Where this is true, it seems that there could be no good reason why all the parties to the actions could not be summoned at one time, and all the controversies, arising out of the same transaction, be determined at one sitting. Where there is such

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[2] *Crawford* v. *Mobile, etc. R. Co.*, 83 Miss. 708, 36 So. 82, 102 Am. St. Rep. 476 (1902).

[3] 1 POMEROY, EQUITY JURISPRUDENCE (4th ed., 1918) §§ 255, *et seq.*

[4] *Cumberland Tel. & Tel. Co.* v. *Williamson*, 101 Miss. 1, 57 So. 559 (1910).

[5] See 10 R. C. L. 283; *Southern Steel Co.* v. *Hopkins*, 157 Ala. 175, 47 So. 274, 20 L. R. A. (N. S.) 848 (1908). This case has been overruled by *Southern Steel Co.* v. *Hopkins*, 174 Ala. 465, 57 So. 11, Ann. Cas. 1914 B, 692 (1911); but it illustrates the arguments supporting the minority view.

[6] See 10 R. C. L. 283.

[7] *Tribette* v. *I. C. R. Co., supra; Mechanics' Ins. Co.* v. *Hoover Distilling Co.*, 173 Fed. 888, 32 L. R. A. (N. S.) 940 (1909); see also note 40 L. R. A. (N. S.) 464.

[8] *Railroad Co.* v. *Garrison*, 81 Miss. 257, 32 So. 996, 95 Am. St. Rep. 469 (1902) distinguishing and recognizing the rule in the Tribette case.

[9] See note 8.

a blending of the two systems there is no reason for applying the rule in the principal case. Costs of litigating several actions, involving identically the same procedure in each, both as to proof of facts and application of the law, could be considerably reduced by disposing of the whole matter at one time. In fact, even where there are separate law and equity courts, cost of litigation would be greatly reduced by settling the whole matter in one court at one time.

JAMES S. EATON.

EVIDENCE—JUDICIAL NOTICE NOT TAKEN OF STATUTORY AGENT FOR SERVICE OF PROCESS.

Plaintiffs sued to recover for damages for an alleged pollution of a creek by defendant corporation. Service was had on one Mason, vice-president and statutory agent of defendant for the service of process. Defendant pleaded to the jurisdiction of the court on this ground, demurrer to the plea being sustained. The case then proceeded to trial on the merits. HELD: The court cannot take judicial notice that an individual is statutory agent for service of process. *Masonite Corporation* v. *Burnham et al.,* 164 Miss. 840, 146 So. 292 (1933).

The case was actually reversed and remanded for other reasons, but the court distinctly made a point of stating that it would not take judicial notice of the fact that Mason had been appointed statutory agent for the service of process—this, in the face of the fact that the defendants appeared in court, entered pleading, and went to trial on the merits. In Mississippi, an appearance for any purpose is an appearance for all, if the court has jurisdiction of the subject-matter and the venue is proper.[1] The statement of the court is therefore clearly not necessary to any decision it might render. Moreover, the point does not appear to be raised in any of the appellate briefs, and the court confesses that it had "examined the records in the office of the secretary of state . . . [and] found that W. H. Mason, the vice-president of appellant company, is its statutory agent for the service of process." Consequently, the court must have felt very strongly on the subject to have announced expressly in spite of these circumstances that it "still . . . cannot take judicial notice of that fact."

The court, as authority for its views, cites two previous cases holding likewise.[2] In *National Surety Co.* v. *Board of Sup'rs, etc.,* the defendant was a foreign corporation and service was obtained upon one Mayfield as agent. The court, in reversing and remanding, said the record did not show that he had been appointed under the statute[3] governing insurance companies and that judicial notice could not be taken of any such appointment. In *Globe Rutgers Fire Ins. Co.* v. *Sayle,* involved in controversy was the question whether the court could take judicial notice that defendant had complied with section 2606 of the CODE OF 1906 by appointing the Commissioner of Insurance its attorney in fact for service of process because he had acknowledged acceptance of service on the summons. In refusing to so take notice, the court pointed out that the last clause of this section provided how appointment of the commissioner may be proved.[4] In the first case a decree

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[1] *Turner* v. *Williams,* 162 Miss. 258, 139 So. 606 (1932); MISS. CODE ANN., 1930, §§ 2999, 3000; 6 MISSISSIPPI LAW JOURNAL, 303 (1934).

[2] *Globe Rutgers Fire Ins. Co.* v. *Sayle,* 107 Miss. 169, 65 So. 125 (1914); *National Surety Co.* v. *Board of Sup'rs of Holmes County,* 120 Miss. 706, 83 So. 8 (1919).

[3] MISS. CODE ANN., 1930, § 5165; CODE OF 1906, § 2606.

[4] This clause reads: "It shall obtain from the said commissioner a certificate that it has complied with the laws of the state and is authorized to make contracts of insurance."

pro confesso, and the second, a judgment by default, had been obtained. In this respect they differ from the Masonite Case.

Since the Mississippi statute requires the appointing of an agent in the case of non-resident insurance companies the court might have followed the reasoning of another court in holding that service upon the insurance commissioner was sufficient.[5] That court estopped the non-resident corporation from denying proper service where the return showed service to be on the state auditor. By statute similar to the one in Mississippi the corporation was required to constitute him its attorney in fact for receipt of service of process. The court reasoned that to hold otherwise would permit a non-resident corporation to make itself immune from suit. The court in the instant case might also have followed the reasoning of the Alabama court to the effect that such service obtained upon an insurance company was *prima facie* evidence of service upon the company sufficient to support a judgment by default.[6] In following this view and taking judicial notice the court in the instant case might have pointed out that it had previously taken judicial notice of the holdings of the attorney general and resorted to every proper method of ascertaining from the department what it must know but does not know.[7]

The doctrine of judicial notice has not been developed in the past to the extent that it might have been. Its usefulness has been limited too much to a following of past decisions. Because of this, its possibilities for eliminating waste of time in trials smothered with technicalities have not been made the most of. In a case involving facts similar to those of the instant case, for example, the court might, in taking judicial notice of the statutory agent for service of process, prevent the necessity of a new trial on account of a mere technicality.

Seemingly, courts have overlooked also the fact that they need not be so strict in following precedents, since the doctrine, itself, is a wide, discretionary power. A court is not bound to follow a previous decision made in a particular case. The doctrine should be applied specifically and not with a view to building up a related line of reasoning. One reason evidently for this failure to make more use of judicial notice is the failure to understand that the court may notice much which it cannot be required to notice.[8] Notoriety in fact is the basis of the doctrine, and facts are not susceptible to any general rule which will govern in all cases.[9]

Though classified as a sub-division of evidence the doctrine of judicial notice is not peculiarly a part of that branch of the law. It is really concerned with the whole scope and field of law. This habit of regarding it under evidence is quite modern. Many cases raise no such question at all.[10] They relate to pleading, construction of the record and other writings, legal definitions of words, the regulation of the conduct of trials, etc.

Statutory requirements authorize courts to take judicial notice of certain facts.[11] The common law permitted notice of others. Courts are at liberty to notice all that is necessarily or justly imputable to them, as necessary in the discharge of the judicial function. It is in this last class that the opportunity awaits the courts for improving the administration of justice. In this the courts are per-

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[5] *Wylie Permanent Camping Co.* v. *Lynch,* 195 Fed. 386 (W. Va., 1912).
[6] *Prud. Cas. Co.* v. *Kerr,* 202 Ala. 259, 80 So. 97 (1918).
[7] *Briscoe* v. *Buzbee,* 163 Miss. 574, 143 So. 407 (1932).
[8] 5 WIGMORE, EVIDENCE (2d ed., 1923) § 2583, p. 599.
[9] *People* v. *Schmitz,* 153 Cal. xviii, 94 Pac. 419 (1908).
[10] James B. Thayer, "Judicial Notice and the Law of Evidence," 3 *Harvard Law Review,* 285, at page 287.
[11] For example, see MISS. CODE ANN., 1930, § 1598; *Bates* v. *McCully,* 27 Miss. 584 (1854).

fectly justified in making research to ascertain the necessary knowledge.[12] Much is judicially noticed without proof, of which the court, at the moment, may in fact know nothing.[13] In such a case a court must avail itself of every source of information which it finds helpful for the proper expedition of business even unto requiring aid of the parties,[14] themselves, or from any other proper source.[15] Here, alone, might the court in the instant case have found a basis for taking judicial knowledge of the information it had acquired that Mason was the proper agent for service and so registered with the secretary of state. By doing so, it would have been only exercising its own discretion, and not in any way binding the court in succeeding cases. It would not be a search for evidence but merely an occasional measure, taken in discretion, to satisfy the court that it is justified in making the desired ruling, in order to dispense with the production of evidence which was necessary for technical purposes only.[16]

FRED B. PATTON.

GARNISHMENT—CONTENTS OF SAFETY DEPOSIT BOXES AS PROPERTY SUBJECT TO.

P secured a judgment against D, and upon being informed that the garnishee bank was indebted to D, secured a writ of garnishment which was served on said bank. The bank's answer admitted an indebtedness and set up the fact that D had rented from it a safety deposit box, the contents of which were unknown to garnishee and which could not be opened without the use of a key held by D in conjunction with one held by the bank. HELD: The contents of such box were subject to garnishment, and an order issued by the court below commanding the sheriff to take possession of same, was correctly issued (three of the six judges dissenting). *Wineman* v. *Clover Farms Dairy,* —— Miss. ——, 151 So. 749 (1934).

The earliest authority on the question presented in this case was to the effect that the contents of a safety deposit box could not be reached by garnishment; the contents of such boxes being in the possession of the renter of the box.[1] As late as 1906 the Cyclopedia of Law and Procedure, written in that year, stated: "According to the weight of authority, property or funds deposited with a safety deposit company cannot be reached by garnishment proceedings."[2] But looking to Corpus Juris, the successor to Cyc, we find this contradictory statement: "Accordingly, a safety deposit company may be held accountable in garnishment for the contents of a box or vault rented by the defendant."[3] And again, in Ruling Case Law, "In the case of property placed in a safety deposit box, garnishment against the bank, which is the lessor of the box, is a proper remedy, by the weight of authority, though a slight conflict must be admitted."[4] These latter statements are of course based on the more recent decisions, and such decisions now completely outnumber the older cases.

The cause of such a radical change in so short a time seems to be twofold:

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[12] *People* v. *Mayes,* 113 Cal. 618, 45 Pac. 861 (1896).
[13] *King* v. *Caraway,* 132 Miss. 679, 97 So. 422 (1923).
[14] *School District* v. *Insurance Co.,* 101 U. S. 472, 25 L. ed. 868 (1879).
[15] *Witherspoon* v. *State ex rel. West,* 138 Miss. 310, 103 So. 134 (1925).
[16] See 5 WIGMORE, *loc. cit.,* note 8.

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[1] *Gregg* v. *Hilson,* 8 Phil. (Pa.) 91 (1871); *Bottom* v. *Clarke,* 61 Mass. (7 Cush.) 487 (1851); *Gregg* v. *Nilson,* 1 Leg. Gaz. R. Pa. 128 (1871).
[2] 20 CYC. 1022.
[3] 28 CORPUS JURIS, 86, § 105.
[4] 12 R. C. L. 805, § 35.

(1) The realization by the courts as to just what relationship exists in case of lessor and lessee of a safety deposit box; and (2) the passing of statutes in most jurisdictions regulating garnishment proceedings and the liberal construction of these statutes by the various courts.

The generally accepted rule now is that the relation of the company renting a safety deposit box to its customers is that of bailee or depositary for hire,[5] although one of the dissenting opinions in the present case strongly denies any such relationship.[6]

As already indicated, garnishment proceedings are now largely regulated by statute and the chief objections to the holding of the Mississippi Court in the case under discussion, as raised by the dissenting opinions, present two difficulties to the use of the writ: (1) That the contents of a safety deposit box are not within the possession and control of the garnishee within the meaning of the statute;[7] (2) that the circuit court is without authority or power to make and enforce an order commanding the sheriff to take possession of the box and open it.

Missouri has a statute[8] very similar to the Mississippi statute and requiring that the goods be in possession and control of the garnishee. In construing this statute the Missouri Court said, "Property in a safe deposit box is in the bank's possession and control within the meaning of the statute, and hence subject to garnishment under writ of attachment against the lessee of the box."[9] One of the dissenting opinions in the instant case makes much of the fact that the bank cannot open the box without the use of a key held by the lessor.[10] However, the authorities seem unanimous in holding that the mere existence of two keys does not keep the contents of the box from being within the control of the bank. "In such cases, the court may cause the box to be opened to determine the garnishee's liability. This is true for example, under a statute requiring a garnishee to answer as to any personal property of defendant, under his control, and a bank which has rented a box in a safety deposit vault to the defendant is subject to garnishment where the boxes in the vault can be opened only by two keys, one a master's key in possession of the bank, and the other a private key, in the box renter's possession. The garnishee, in such a case, has control of the box."[11] Under a Washington statute commanding a garnishee to answer as

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[5] *Lockwood* v. *Manhattan Storage & Warehouse Co.*, 28 App. Div. 68, 50 N. Y. Supp. 974 (1898). "Relationship existing between the lessor of a safety deposit box and that of his customer is one of bailee and bailor for hire," *West Cache Sugar Co.* v. *Hendrickson, et al.*, 56 Utah 327, 190 Pac. 946, 11 A. L. R. 216 (1920). "We are of the opinion that the relation of bailor and bailee exists between lessor and lessee of safety deposit box and that the deposit of securities in such box is a bailment, and the law applicable to bailments generally applies," *National Safe Deposit Co.* v. *Stead*, 250 Ill. 584, 95 N. E. 973, Ann. Cas. 1912B, 430 (1912).

[6] 151 So. at 752.

[7] Miss. Code Ann. 1930, § 1843: "Every person duly summoned as a garnishee shall answer an oath as to the following particulars, viz.: . . . What effects of the defendant he has or had at the time of the service of the writ on him, or has had since, in his possession or under his control."

[8] Missouri Revised Statutes, 1919, § 1853.

[9] *State ex rel. Rabiste* v. *Southern*, 300 Mo. 417, 254 S. W. 166 (1923). "A bank is subject to garnishment for the property of a customer even when held in a safety deposit box in the bank," *Farmers' Savings Bank of Hartwick* v. *Roth et al.*, 195 Iowa 185, 191 N. W. 987 (1923).

[10] See footnote 6, *supra*.

[11] 12 R. C. L. 805, § 35.

to personal property or effects of the defendant in his possession or under his control, it was held that a safe deposit company, having valuables of the debtor in its vaults was subject to garnishment therefor, although it had no access to the contents of the box in which the valuables were kept.[12]

In accordance with the well-known course of business of banks and trust companies, the safety deposit boxes themselves are certainly subject to the general control of the lessor. Access to them can only be obtained by the lessee at such times and under such restrictions as the lessor imposes, and at all times the boxes are subject to the protection and care of the lessor. The lessor has exclusive physical control of the box as to all the world except the lessee. A trunk or box delivered to the bank for keeping would clearly be in the possession and control of the bank as bailee although such trunk or box might be securely locked or sealed. The mere placing of such a box in a vault with others of the same type for the purpose of convenience and protection, should not have the effect of taking it out of the possession and control of the bank.[13]

The second point raised in the dissenting opinions as to the power of the court to make such an order as was made in this case presents a more dubious question.[14] In *West Cache Sugar Co.* v. *Hendrickson et al.*,[15] the Utah Court said: "A court having jurisdiction of the parties and the subject matter may require a garnishee to open a safety deposit box which the debtor rents of it, where the statute provides that when jurisdiction is conferred on a court, all the means necessary to carry it into effect are also given. It certainly would be a reproach to our jurisprudence and to the administration of the law if it were held that the law may successfully be defied by human agencies and that courts cannot make their processes effective merely because valuable property may be locked and concealed in a steel safe or receptacle. The court's order may not be baffled merely because the lessee or owner of a safety deposit box refuses to surrender the key by which the box, in connection with the master key, is opened. If, therefore, there is any method or device available by means of which such boxes can be opened without destroying them or their contents, the courts have ample power to direct those who have possession and control of such boxes to open them by any available method." Probably the leading case on this question is that of *Tillinghast* v. *Johnson*,[16] in which the court said: "The contents of a safety deposit box are not rendered exempt from garnishment in the hands of the company maintaining and renting the right to use it, by the fact that it can be opened without injury only by the use of a key in the possession of the customer, if, under the statutes, the court has power to direct the forcible opening of the box to secure an examination of its contents; which power it has when the statutes authorize examination of the garnishee and the taking of such action in accordance with proper legal proceedings as will enable it to determine the liability of the garnishee."[17]

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[12] *Trowbridge* v. *Spinning*, 23 Wash. 48, 62 Pac. 125, 54 L. R. A. 204 (1900).

[13] *Hooper* v. *Day*, 19 Me. (1 App.) 56, 36 Am. Dec. 734 (1841); *Tillinghast* v. *Johnson*, 34 R. I. 136, 82 Atl. 788, 41 L. R. A. (N. S.) 764, Ann. Cas. 1914A, 960 (1912).

[14] 151 So. at 753.

[15] See footonte 5, *supra*. Sustaining the same point, see *Cole* v. *Utah Sugar Co.*, 35 Utah 148, 99 Pac. 681 (1909).

[16] *Supra* note 13.

[17] See upholding the same principle, *United States* v. *Graff*, 67 Barb. (N. Y.) 304 (1875): "There was nothing improper in that portion of the order made which directed the sheriff to open the safe and tin box containing defendant's property. The process could be effectually served in no other way. It was the

The Mississippi statutes clearly do not go as far as the statutes under which these cases were decided, for no express power is anywhere given to circuit courts to enter an order as was entered in this case. However, there is a Mississippi statute providing in part as follows:[18] "All property in the hands of the garnishee belonging to the defendant at the time of the service of the writ of garnishment, shall be bound by and subject to the lien of the judgment, decree, or attachment on which the writ shall have been issued." Under this section the contents of a safety deposit box, being in the hands of the garnishee bank as has already been shown, are bound by and subject to the lien of the judgment, decree, or attachment on which the writ of garnishment was issued. For the statute to provide for a lien and not to provide any means of enforcing same would amount to a mere nullity, and surely would not be the intention of the body passing such a statute. It follows then (and such does not seem too liberal a construction) that the statute having granted a lien, the court will have the implied power and authority to enforce such a lien according to the usual manner of procedure. Commanding the sheriff to take the contents of the deposit box into custody, as was done in this case, would certainly not be a violation or extension of this authority.

However, it is the duty of the courts and their officers, at all times and under all circumstances, to protect the rights of the garnishee and those who may have business relations with them; and to do justice to all parties many courts have held that all parties should be represented when the box is opened. The court here probably would have more fully protected the garnishee and the lessor of the box if it had made the order read so as to have all parties present or represented when the box was opened.

GUY MITCHELL, JR.

INSURANCE—MISTAKE OF FACT AS TO INVALIDITY OF POLICY—RETURN OF PREMIUM AS CONSIDERATION FOR RELEASE.

Plaintiff was beneficiary of an insurance policy on her son's life, taken out with the defendant. After the death of the son, the defendant asserted that the son had died of a malignant sarcoma with which he had been suffering at the time the insurance was issued, and declared that the policy was void. In consideration for the return of the premium paid ($8.25), the plaintiff executed a written release of the defendant's liability under the policy. It was stated in the release that the policy was surrendered because of "impaired risk at the time of the issuance of the policy due to an injury two years ago." The lower court excluded the release from the evidence on the ground that it was based on insufficient consideration. The jury found that the son had not been suffering from malignant sarcoma at the time the policy was issued. HELD: The return of the premium was not a sufficient consideration for the plaintiff's release, and the release was properly excluded from the evidence. *National Life and Accident Insurance Company* v. *Williams,* —— Miss. ——, 146 So. 455 (1933).

There are several grounds which might at first seem to justify the court in allowing the plaintiff to recover on this insurance policy; but the most potent

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duty of the officer acting under it immediately to attach the property of the debtor and that could only be done by taking it into his custody."

[18] MISS. CODE ANN., 1930, § 1844.

reason for such a holding seems to have been overlooked by the court, and its attention diverted to the question of consideration. The real reason why this release should not be held a bar to liability on the policy—if it should not—is that any other holding would be contrary to the intention of the parties. The primary question to be decided in this case is whether the parties intended for the effectiveness of the release to be conditioned upon the fact that the son had a malignant sarcoma at the time the policy was issued, or if they meant for the release to be operative regardless of the fact that they might later find—as the jury did find to be true—that they were both mistaken. The court might have found that, as a matter of law, the intention of the parties was to make the fact that the son had the sarcoma at the time the policy was issued a condition precedent to the effectiveness of the policy.[1] In that event, the holding of the lower court in excluding the release from the evidence would necessarily have to be affirmed. However, in most similar cases, the question of the intent of the parties has been left to the jury to decide[2] under proper instructions.[3] According to the case of *Home Insurance Co.* v. *Chattachoochee Lumber Co.*,[4] the burden of proving the intention of the parties to rescind rests with the party trying to prove a mutual cancellation.

If the jury should find that the intention of the parties in the instant case was to execute the release unconditionally, in spite of the statement made in the release, there would still remain the question of whether or not the release could be invalidated because of the defendant's misrepresentation, or because of the mutual mistake. The mistake was one of fact, or at least a mistake with respect to private legal rights so as to be considered a mistake of fact under the rule laid down in *Alabama and V. Ry. Co.* v. *Jones*.[5] In such cases, it seems that the reasonableness of the belief of the party holding out a fact is a deciding point.[6] The general rule is that where parties on entering into a transaction that affects their contractual relations are both under a mistake regarding a fact assumed by them as the basis on which they entered into the transaction, it is voidable by either party if enforcement of it would be materially more onerous to him than it would have been had the fact been as the parties believed it to be.[7] Unless the instant case could be brought under an exception to this rule, which seems doubtful, the jury might have readily found that the mistake was such as to vitiate the release.

The court, in the instant case, seems to have needlessly entangled itself in the

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[1] See *Miller* v. *Continental Ins. Co. of N. Y.*, 152 Minn. 404, 188 N. W. 1000 (1922), where the court found that the evidence was insufficient to support a finding of mutual cancellation.

[2] *Doherty et al.* v. *Phoenix Ins. Co.*, 224 Mass. 310, 112 N. E. 940 (1916); *Polemanakos* v. *Austin Fire Ins. Co.* (Tex. Civ. App., 1913), 160 S. W. 1134; *Bemidji Iron Works* v. *Agricultural Ins. Co.*, 148 Minn. 193, 181 N. W. 340 (1921).

[3] 1 WILLISTON, CONTRACTS, 26, § 22 (1927).

[4] 126 Ga. 334, 55 S. E. 11 (1906).

[5] 73 Miss. 110, 19 So. 105 (1895).

[6] *Crooker et al.* v. *White et al.*, 162 Ala. 476, 50 So. 227 (1909); *Southern Development Co.* v. *Silva*, 125 U. S. 247, 8 S. Ct. 881, 31 L. ed. 678 (1887).

[7] 2 RESTATEMENT, CONTRACTS, § 502 (1932). But see *Holcomb* v. *Stimpson*, 8 Vt. 141 (1836) holding *contra*. That case is very similar to the instant case. The mistake was one as to whether or not one of the parties was father of an illegitimate child. It was a fact within the province of the jury, as was the fact in the instant case. An agreement to pay a sum of money to the mother was held binding in spite of her misrepresentation. See also *Bell* v. *Lawrence's Adm'r*, 51 Ala. 160 (1874).

question of consideration, and excluded the release from the evidence entirely, on the ground that it was based on no consideration. The court says: "The principal question presented by this appeal is: Whether or not the return of the premiums paid . . . constituted consideration for the execution of the release by the appellee [plaintiff]. We are of the opinion that it did not. This sum was not paid in settlement of any disputed amount or liability by the payment of a less sum than due or claimed. It was merely the return of that which belonged to the appellee, if the theory advanced by the appellant and accepted by the appellee at the time of the execution of the release was correct." The court seems to have overlooked one important fact in the above statement. Even if the theory of the defendant had been correct, and the policy been, in fact, void, the plaintiff would not necessarily have been entitled to the premium already paid. The fact that the $8.25 did not belong to the defendant does not mean that it belonged to the plaintiff. The right to recover premiums on an insurance policy void from the beginning is the right of the insured or his personal representative, not of the beneficiary.[8] So, even though the theory of the defendant be accepted, as far as the plaintiff was concerned, the $8.25 belonged to the defendant, and the personal representative of the deceased son could sue for the return of the premium. And the fact that the company returned the $8.25 in the belief that they were returning the premiums would make no difference, unless the court meant to hold that that belief alone makes the consideration insufficient. This holding would be contrary to the rule that anything which is a benefit to the promissor or a detriment to the promissee is good consideration. It is true that "where a policy of insurance is payable to the estate of the insured, heirs at law may bring an action on the policy, on showing that there were no debts."[9] In the instant case, however, there is no indication that the plaintiff was administratrix of her son at the time the release was executed or that she brought herself within the rule just announced; and it is therefore assumed that neither of these circumstances is true.

From the standpoint of consideration, this case becomes exactly what the court said it was not: a case of a compromise of a claim—$8.25 is being paid for the release of a doubtful claim.[10] Under such circumstances there is no good reason for excluding the release from the evidence on the ground of lack of consideration.

T. Y. Minniece.

Marriage—Subsequent Remarriage of Both Husband and Wife—Presumption of Validity of Second Marriage—Estoppel of Wife to Deny Validity of Husband's Second Marriage.

The complainant was married in 1908 to one Fears, who shortly thereafter abandoned the vicinity. In 1911 the complainant had received a telegram purportedly from her husband's sister, informing her of his death. This was the only information concerning the husband from the time of his abandonment until his

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[8] *Seaback* v. *Metropolitan Life Ins. Co.*, 274 Ill. 516, 113 N. W. 862 (1916); *Jefferson Standard Life Ins. Co.* v. *McIntyre et al.* (5th C. C. A., 1923), 294 Fed. 886; *Norwich Union Fire Ins. Co.* v. *Prude et al.*, 145 Ala. 297, 40 So. 322 (1906).

[9] *Henry et al.* v. *Knights and Daughters of Tabor*, 156 Ark. 165, 246 S. W. 17 (1922).

[10] See *Stanley* v. *Sumrall* (Miss., 1933) 147 So. 786; 6 Miss. Law Journal, 178 (1933).

death in 1932. Relying on the telegram and the absence for over seven years of the husband, the complainant contracted a second marriage which ended in a divorce. She subsequently married a third time; this husband died. Fears actually lived until 1932, having married the defendant in the meantime and had by that marriage three children. Learning subsequent to Fears' death of the fact that he had lived until 1932, the complainant brought this suit in equity, claiming his estate. HELD: She was estopped to set up the illegality of Fears' second marriage. *Harper* v. *Fears,* —— Miss. ——, 151 So. 745 (1934).

The court in the instant case indulges in the well established presumption of divorce in favor of a subsequent duly performed marriage. The court does not decide that the complainant has failed to sustain the burden of proof in rebutting this presumption, but instead makes the said presumption conclusive. This conclusion as to the effect of the decision follows by necessary inference from the declaration of the court that the complainant "was estopped to set up her claim." The reason advanced for the so-called "estoppel" is simply that "to hold otherwise in this case would be to convict five persons of adultery, and would bastardize three innocent children."

The law with regard to the presumptions in favor of the legality of marriages has been copiously dealt with in a great many decisions in this country. A few of the more recent cases have been selected as briefly exemplifying and summarizing this field of legal thought.

The general rule is that the presumption of the dissolution of a prior marriage arises upon the proof of a subsequently duly performed marriage.[1] This presumption has received practically universal application. It is of sufficient weight to overcome the presumption of the continuance of a marriage shown once to exist, that is, the prior marriage,[2] and is, moreover, the strongest known to law,[3] because of its sacredness and public importance.[4] The burden of proof by virtue thereof is placed upon the one attacking the validity of the marriage[5] to show, not only the existence of a prior legally contracted marriage, but also that the marriage has not been dissolved, even though this may require proof of a negative.[6] The great weight of authority is to the effect that the proof must be clear and convincing,[7] distinct and positive,[8] cogent and satisfactory.[9] There seems to be a difference of opinion, however, upon the question of whether or not the party upon whom the burden rests must rebut the aforementiond presumption by *conclusive* evidence. The Mississippi Supreme Court has, in the case of *Colored Knights of Pythias* v. *Tucker, supra,* decided the question in the negative. Upon the other hand, there is a line of cases, culminating in a recent Missouri decision, taking the affirmative position. That opinion is couched in the following forceful language:

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[1] 1 JONES, COMMENTARIES ON EVIDENCE (2d ed. 1926), 113-5, § 61.

[2] *Alabama & Vicksburg Ry. Co.* v. *Beardsley,* 79 Miss. 417, 30 So. 660 (1901); *Howard* v. *Kelly,* 111 Miss. 285, 71 So. 391, Ann. Cas. 1918E, 1230 (1916). See also, "The Conflict of Presumptions on Successive Marriages by the Same Person," 30 *Harv. Law Review,* 500 (1917).

[3] *Sloan* v. *West,* 50 Wash. 86, 96 Pac. 684, 17 L. R. A. (N. S.) 960 (1908).

[4] *Colored Knights of Pythias* v. *Tucker,* 92 Miss. 501, 46 So. 51 (1908).

[5] *Howard* v. *Kelly, supra; Alabama & Vicksburg Ry. Co.* v. *Beardsley, supra.*

[6] *Colored Knights of Pythias* v. *Tucker, supra; Alabama & Vicksburg Ry. Co.* v. *Beardsley, supra.*

[7] *Colored Knights of Pythias* v. *Tucker, supra.*

[8] *State Highway Board of Georgia* v. *Lewis,* 46 Ga. App. 162, 167 S. E. 219 (1933); *Schuler* v. *Schuler,* 114 N. J. Eq. 220, 168 Atl. 468 (1933).

[9] *Sloan* v. *West, supra.*

"Evidence to repel the presumption of the validity of a second marriage, must be strong, distinct, satisfactory, and conclusive. The presumption in favor of the validity of a second marriage is not to be lightly repelled, and the invalidity of the second marriage cannot be found, unless the parties holding the burden of establishing it complete a chain of evidence which will aggressively exclude every indication or suggestion which might conceivably rescue the second marriage from invalidity."[10]

The soundness of the Missouri decision quoted above may be justly impugned in view of the following excerpt from a widely recognized authority upon the law of evidence:

"In our opinion, the presumption of dissolution of a prior marriage by death or divorce should be indulged with caution. We apprehend that such presumptions sometimes have been applied with very little justification. A rule of law which imbues evidence with an artificial or technical force beyond its natural tendency to convince the mind, and requires courts and juries to presume as true that which probably is false, cannot but be fraught with dangerous consequences. In case of a conflict of presumptions, it would appear more reasonable that that one should yield which has the least probability to sustain it, rather than that the one in favor of innocence and of validity of the subsequent marriage should prevail."[11]

This rational admonition may well be taken into account should the court in the instant case be confronted with circumstances somewhat similar to those embodied in it.

One meeting for the first time a problem having to do with the presumption resolved in favor of a subsequent marriage as against a prior marriage would doubtless deem it odd that this somewhat singular presumption should shift the burden of proof, when it is so elementary as to be practically axiomatic that the true effect of a presumption is not to shift the burden of proof, which remains the same from the inception of the case until the issues are determined, but only to shift the burden of going forward with the evidence.[12] This, in truth, is the general rule; the exception is founded upon that vague something commonly called "public policy." Public policy may be defined as the opinion of an individual (the court) upon what is to the best interests of a group of individuals. It is manifestly, therefore, a tool which should have application in the most cautious manner.

The rigidity to which the party attacking the validity of the subsequent marriage will be held in sustaining the burden imposed upon him by public policy is, as a matter of practical knowledge, ultimately determined by the court by means of its power to set aside a verdict because contrary to the weight of evidence adduced upon trial. Thus, the court will be found greatly influenced by the surrounding circumstances as bearing upon the relations and equities of the various parties. So, the presumption will increase in strength with the lapse of time and by birth of children.[13] But, where the issue is between rival claimants to the rights of the surviving widow of a person deceased, there is no apparent

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[10] *Griggs* v. *Pullman Co.*, 40 S. W. (2d.) 463 (Mo. App., not off. rep., 1933). See also the cases cited therein.

[11] 1 JONES, *op. cit.*, 118, § 63.

[12] 1 JONES, *op. cit.*, 60, § 31; 5 WIGMORE, EVIDENCE (2d. ed., 1923), §§ 2489-91.

[13] *Sloan* v. *West, supra; Cooper* v. *Cooper,* 11 N. J. Misc. 720, 168 Atl. 153 (1933); *City of New York* v. *Kaiser,* 143 Misc. Rep. 737, 257 N. Y. S. 218, (1932).

reason for barricading the relationship of the one with presumptions and declining to allow the other to contest the issue on equal terms.[14]

The party attacking the marriage must show that same has not been dissolved by either spouse. This may, under certain circumstances, require the attacking party to prove no divorce in any county in which either the husband or the wife resided.[15] This, like any other fact is subject to various modes of proof. A North Dakota case has held that testimony of an attorney to what the records of the county commissioners did not contain was not the best evidence, and that the records themselves should have been produced or else the official custodian should have been called.[16] In *Re Colton's Estate, supra,* the court comments adversely upon this case, holding that a competent attorney who had made diligent search of the records was qualified to testify as to what they failed to contain, namely, record of a divorce. Some courts require a foundation for raising the presumption aside from the mere proof of the second marriage. Thus, a presumption that one spouse has obtained a divorce will not be entertained where it is shown that he could only have obtained same by asserting facts known by him to be false and supporting them by perjured testimony, as where a husband deserted his wife and had no cause or ground for divorce.[17] Again, it has been held that the presumption may be rebutted by admissions of the parties.[18]

The complainant in the instant case has, by the substantive law of descent and distribution, certain legal rights, namely, to inherit of her deceased husband's estate.[19] These rights she is denied in the instant case. She is not concluded of these rights by any manner of fault of her own making. She was an entirely innocent party throughout. She had the right to rely upon the continued absence of James Fears and the telegram from his sister informing her of his death which right is, in truth, admitted in the present case.[20] The complainant, in short, was guilty of no acts or representations which would work an equitable estoppel against her to set up her rights to the estate of James Fears. It is true that the court employs the term "estoppel" in connection with the complainant, but the only reason given therefor is that to hold otherwise would bastardize three innocent children and convict five persons of adultery. This, it is respectfully submitted, is no recognized basis for the doctrine of equitable estoppel. Nor are there present in this case the necessary elements of estoppel.[21] The court simply considered the interests of society in the legitimacy of children paramount to the legal individual rights of the complainant.[22]

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[14] *In re Colton's Estate,* 129 Iowa 542, 105 N. W. 1008 (1906).

[15] *Harper* v. *Fears, supra,* citing *Pigford* v. *Ladner,* 147 Miss. 822, 112 So. 785 (1927).

[16] *Sykes* v. *Beck,* 12 N. Dak. 242, 96 N. W. 844 (1903).

[17] *In re Colton's Estate, supra.*

[18] *Sloan* v. *West, supra.*

[19] See Miss. Code Ann., 1930, § 1404.

[20] This is recognized in the present case. See Miss. Code Ann., 1930, § 1537.

[21] Essential elements of estoppel: "1. There must be conduct, acts, language, or silence amounting to a representation or a concealment of material facts . . . 5. The conduct must be relied upon by the other party and, thus relying, he must be led to act upon it . . ." 2 Pomeroy, Equity Jurisprudence (4th. ed., 1918), 1644-5, § 805.

[22] "In an action involving the validity of a marriage and the right of a surviving wife or widow to her interests as such in her deceased husband's property, she is not estopped from maintaining such action on the ground of public policy, morality or decency, where it appears that she may have honestly believed that she

The courts have naturally gone a long way in preserving the legitimacy of offspring, but no court has gone so far in that respect as has the Mississippi Supreme Court in the instant case. The justification, apparently, is *public policy*.

As is suggested in the case under discussion:

"The law is supposed to be the perfection of reason, and it changes, from time to time, to conform to standards, custom, and common sense."[23]

This is a laudable declaration and our decisions the world over bear it out. Just what principles conform to "standards, custom, and common sense," however, is quite another matter. The query naturally suggests itself at this point: To what extent will the court of Mississippi go in the future in its application of the doctrine so boldly advanced in the instant case? The rule that a second marriage is conclusively presumed to be valid, if carried to its logical conclusion, may possibly become a boomerang to defeat the high purpose for which it was conceived. To avoid this catastrophe the rule should be applied with the utmost caution, and restricted carefully to facts and circumstances on all fours with, or, at least, closely analogous to those presented in the present case. The reason for this is at once apparent. It is submitted that in a vast majority of the cases in which the question arises, a *conclusive*[24] presumption of a dissolution of a prior marriage in favor of the legality of a second would doubtless result in great injustice, and this even though the legitimacy of children is involved.

However, there need be little fear of any retroactive ill effects of *Harper* v. *Fears* if the court continues to consider itself no more bound by legal precedent than it has in that case.

VARDAMAN S. DUNN.

TRIAL—DIRECTED VERDICTS—TESTS FOR GRANTING PEREMPTORY INSTRUCTIONS—OPINION EVIDENCE.

On a conviction of defendant for homicide, the evidence in defense was "of cogent and consistent strength throughout and corroborated upon every material issue." The evidence for the state was so "weak," "slender," and "attenuated" that the appeal court expressed itself as being, for that reason, in duty bound to "examine the transcript in minutest detail . . . to ascertain whether or not there was something not according to the law of the land" which turned the verdict; and as a result of its search, the appeal court "apprehended as a probability" that there was an evil influence operating around the trial court, as shown by the fact that two witnesses were jointly indicted by the grand jury, for the purpose of discrediting them as witnesses, when the grand jury had not a "shred of evidence" warranting their indictment. HELD: A peremptory instruction was properly refused, but a new trial should have been granted on the "assigned ground that the verdict is contrary to the great or overwhelming weight of the evidence." *Turner* v. *State,* —— Miss. ——, 151 So. 721 (1934).

There probably has been no period in the history of the administration of law when the bench, the bar, and the public as a whole have been more clamorous

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has lived with another as his wife." *Hilton* v. *Stewart,* 15 Idaho 150, 96 Pac. 579, 128 Am. St. Rep. 48 (1908).

[23] Citing *Funk* v. *United States,* (U. S., 1933), 54 S. Ct. 212.

[24] "It is apparent, from the English, as well as the best considered American, cases, that there is no unbending presumption in favor of a second marriage or of the innocence of the parties, but, on the contrary, that the decision of any particular case must rest on its own attending facts and circumstances." 1 JONES, *op. cit.,* 117, § 63.

than now, for reform of trial procedure and the elimination of useless trials and re-trials that serve no purpose but to clog the calendars and waste the time of courts at public expense. At such or at any time it is difficult to understand why the court refused to recognize the right of the defendant to a peremptory instruction. To experienced triers of cases and even to laymen it seems safe to assume that the state has presented on the original trial all the evidence it could muster to prove defendant's guilt, and that the state is not saving and should not be allowed to save an "ace in the hole" for use in the event of a new trial. In the principal case the court even stated that it was "manifest from the record that substantially all the facts that *could* be ascertained are shown in this transcript."

Why then send the case back for a new trial when all the state can do is to present to another jury exactly the same facts and no more? If they convict again, the defendant would again be entitled to a new trial, but under the rule of the instant case he would not be entitled to a peremptory instruction. One wonders what would then happen. Suppose that after his second new trial he is again tried on exactly the same evidence and convicted in this same local court room in which this evil influence once paraded. He still under the rule adopted, would not be entitled to a peremptory instruction, and this must go on *ad infinitum* were it not for the blessed relief (?) afforded by the Mississippi Code of 1930 which puts a stop to this "wheel within a wheel" by providing that "no more than two new trials shall be granted to the same party in any cause."[1] It would then seem that the court would be driven to the necessity of hanging the man on evidence so "weak, slender, and attenuated" as to indicate that he had been indicted by a corrupt grand jury and tried by an evilly influenced petit jury and not according to the law of the land!

Rather than this, would it not be better for our courts to adopt the modern trend of giving to the trial judge more control over the jury without the necessity of becoming a mere automaton, bound by whatever capricious verdict they may render? This view, exploding the old scintilla test for granting of peremptories, and substituting in its place the modern rule that, "when a motion is made to direct a verdict, the trial judge should sustain the motion when, considering all the evidence, it clearly appears to him that it would be his duty to set aside a verdict if found in favor of the party upon whom the burden of proof rests," is nowhere better expressed than by the Supreme Court of Iowa in *Meyer* v. *Houck*.[2] The United States Supreme Court in numerous cases, including *Chicago, M. & St. P. R. Co.* v. *Coogan*,[3] has stated that it is the "duty of the trial judge to direct a verdict for one of the parties when the testimony and all the inferences which the jury reasonably may draw therefrom would be insufficient to support a different finding." Cases in point from practically every state except Mississippi are collected in 17 A. L. R. 910, and in 19 *Michigan Law Review*, 474.

It is difficult to determine which is the rule in Mississippi. In *Newton* v. *Homochitto Lumber Co.*,[4] it is said that, "While the trial judge may grant a new trial where the evidence in support of the verdict is against the great weight of the evidence in the case, he cannot direct the jury peremptorily." The court

[1] Miss. Code Ann., 1930, § 592.
[2] 85 Iowa 319, 52 N. W. 235 (1899)
[3] 271 U. S. 472, 46 S. Ct. 564, 70 L. ed. 1041 (1926).
[4] 162 Miss. 20, 138 So. 564 (1932).

then proceeds to say that a verdict may be directed for defendant only when plaintiff's proof is so unreasonable and contradictory that it cannot be reasonably accepted. It is submitted that since the court is the tribunal to decide whether it may be "reasonably accepted," this gives the court power to direct whenever it thinks the evidence cannot reasonably support a verdict and feels that it should be set aside. Since the time of Judge Sharkey it has been held in Mississippi that even where there may have been *some* evidence conducing to prove the plaintiff's case, but the court granted a peremptory instruction against him, nevertheless, under the settled rule that where it is apparent that justice has been done, and that a new trial would have been granted had not a peremptory instruction been directed, a new trial will not be granted on appeal and the peremptory instruction shall stand.[5]

It is further worthy of comment, that the same judge who wrote the opinion in the principal case, on the same date in a case reported on the opposite page of the same advance sheet, decided that a peremptory instruction should have been granted to the defendent in a case where there was some evidence tending to substantiate the defendant's liability.[6] In that case, the plaintiff, driving a car at night, attempted to cross a railroad crossing and immediately as he came upon the track, the car's right front wheel came off and before his car could be moved a passing train demolished it. The plaintiff testified that the "cause" of the wheel's coming off was the fact that the crossing was in a bad state of repair. The court held that the plaintiff's statement of the "cause" of the wheel's departure was mere "conjecture." The effect of this holding is to rule out this testimony as to the "cause" on the ground that it is merely the "opinion" of the witness.

It seems certain that the so-called opinion or conjecture of this witness, who was present and saw the wheel fly off, is far more competent evidence, than is an appellate court's "apprehended probability" of an evil influence operating within the walls of a secret grand jury room.

In *Woolworth Co.* v. *Volking,*[7] an employer raised a window and cut off the heat where the plaintiff employee was working. The sole evidence to show that this was the "cause" of her catching cold, for which damages were allowed, was the plaintiff's naked assertion that this was the "cause." It was there held that in spite of testimony of all other employees that they did not catch cold and were not even cold, a peremptory instruction for defendant was properly refused. Strangely enough, however, the court refused to accept her statement that certain injuries to her eyes and nose were "caused" by the cold, and therefore reduced her judgment to $500.

Can a person know any more definitely the cause of catching a cold, which is all unseen, than he can the cause of a wheel's flying off immediately on a crash into a badly repaired crossing? Certainly, on objection on the ground that this was opinion evidence, the witness should be allowed to give the data of his observation on which he bases his opinion.

That in the Holsomback case, *supra,* the testimony as to the "cause" was "some evidence" which a jury could have accepted, and not mere conjecture, seems also to be upheld by Professor Wigmore in his treatise on the Law of Evidence, of which the Mississippi Court has said that it "is without an equal in

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[5] See *Perry* v. *Clarke,* 6 Miss. (5 How.) 495, at 502 (1841).
[6] *New Orleans & N. E. R. R. Co.* v. *Holsomback,* (Miss. 1934), 151 So. 720.
[7] 135 Miss. 410, 100 So. 3 (1924).

its logical, accurate, and comprehensive statement of the rules governing the production of evidence."[8] Professor Wigmore says, in speaking of the practice of excluding statements as to the "cause" or the effect of a fact, where the witness had power of observation, merely because they were statements of opinion "is only one of the many instances in which the subtle mental twistings produced by the opinion rule have reduced this part of the law to a congeries of nonsense, which is comparable to the incantations of medieval sorcerers, and sullies the name of reason."[9]

JOHN H. FOX, JR.

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[8] *Mississippi Central R. R. Co.* v. *Turnage,* 95 Miss., at 865, 49 So. 840 (1909).
[9] 4 WIGMORE, EVIDENCE (2nd ed., 1923) § 1976, at p. 206.

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